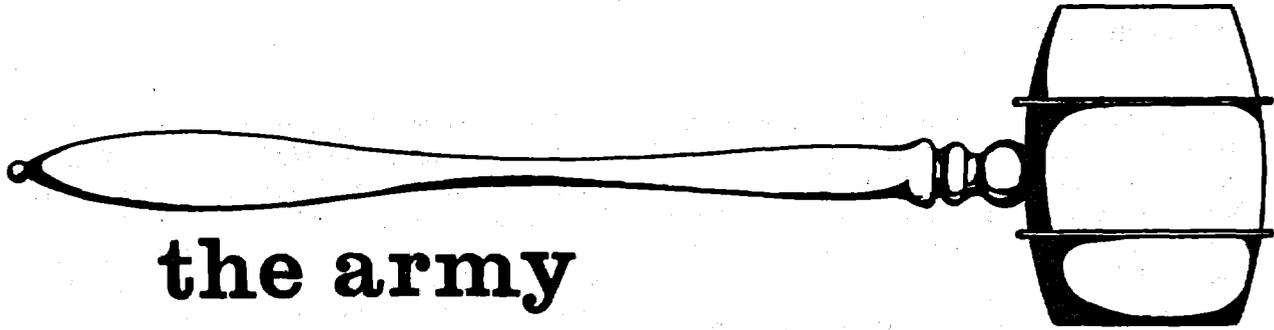


LTC Wilson



**the army**

**LAWYER**

**HEADQUARTERS, DEPARTMENT OF THE ARMY**

Department of the Army Pamphlet 27-50-58  
October 1977

**Late Bid Prestidigitation:  
GAO Modifies Reality When Late Bids  
Arrive**

*Captain Gary L. Hopkins,  
Procurement Law Division, TJAGSA*

Late Bid Prestidigitation: GAO Modifies Reality When Late Bids Arrive	1
Problem Areas in Prompt Payment Discounts	5
Recent Developments in the Taxation of a Military Service Member's "Interest" in Government-Furnished Housing	8
<i>Military Justice Reporter</i> Replaces JALS	9
Reserve Component Technical Training (On-Site) Schedule	9
Reserve Affairs Section	12
Professional Responsibility	12
The Competency of Counsel	14
Judiciary Notes	17
Quarterly Court-Martial Rates Per 1,000 Average Strength	18
Non-Judicial Punishment Quarterly Court-Martial Rates Per 1,000 Average Strength	18
Administrative and Civil Law Section	18
Legal Assistance Items	21
CLE News	22
EPMS—Its Impact Upon the Judge Advocate General's Corps' Enlisted Legal Clerks and Court Reporters	27
JAGC Personnel Section	31
Reassignments of Chief and Senior Legal Clerks and Court Reporters	33
Current Materials of Interest	34

The Armed Services Procurement Regulation (ASPR), implementing 10 U.S.C. Sections 2304 and 2305, establishes the following late bid and modification<sup>1</sup> rule for formally advertised and negotiated procurements:

"(a) Any bid received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made and either:

(i) it was sent by registered or certified mail not later than the fifth calendar day prior to the date specified for the receipt of bids.

(ii) it was sent by mail (or telegram if authorized) and it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation. (Emphasis added.)

(b) Any modification or withdrawal of bid is subject to the same conditions as in (a) above except that withdrawal of bids by telegram is authorized. . ."<sup>2</sup>

The rule is designed to give all bidders an equal opportunity to compete for federal procurements. The two exceptions in the clause that permit the government to accept an otherwise late bid are intentionally very narrow. The in-

tent is to insure that consideration of otherwise late bids will occur only in situations where the bid is late without any fault of the bidder and there is no opportunity to prejudice other bidders. Both exceptions are well written, and one would think, unambiguous.

The General Accounting Office (GAO) apparently believes otherwise. In an unprecedented act of magic that office removed the words "mishandling by the Government after receipt" from the second exception (commonly referred as the government mishandling exception). In a series of decisions, the Comptroller General<sup>3</sup> has expanded significantly the government mishandling exception. Summarized, the expanded exception is as follows:

[W]e [GAO] have held that where, as here, the modification is never received by the contracting installation in any manner prior to bid opening the [government mishandling exception] is inapplicable since it only contemplates instances when a tangible bid—or modification—was mishandled after its physical receipt by the Government. [However,] we have permitted a late modification to be considered where Government mishandling in the process of receipt of the modification is the paramount reason for the late receipt.<sup>4</sup>

This GAO prestidigitation first occurred in 1975 in the matter of Hydro Fitting Manufacturing Corporation (Hydro).<sup>5</sup> Before Hydro, the question of government mishandling of a bid was raised only after a bid was physically received. However, the Hydro decision dramatically altered the rule. In that case the Defense Supply Agency (now Defense Logistics Agency) issued an Invitation for Bids (IFB) on 5 February 1975. Telegraphic bids were authorized. Hydro sent a telegraphic bid which was acknowledged as "received" by the Defense Supply Agency (DSA) Telex. However, when the bids were opened, Hydro's was not among those received. It was established that Hydro's bid was not at the bid opening because the Telex machine ran out of paper, jammed, and failed to record the bid. DSA argued that the bid should be treated as lost and not considered for award. GAO disagreed relying upon the government mishandling exception to permit consideration of the bid. In doing, the GAO observed:

[w]hether there was 'receipt' in the context of the [late bid] regulation is questionable. . . That mishandling by the Government occurred here is, we believe, clear. But, in our view, the regulation contemplates, and our decisions thereon have

---

The Judge Advocate General

Major General Wilton B. Persons, Jr.

The Assistant Judge Advocate General

Major General Lawrence H. Williams

Commandant, Judge Advocate General's School

Colonel Barney L. Brannen, Jr.

Editorial Board

Colonel David L. Minton

Lieutenant Colonel Victor G. McBride

Captain Percival D. Park

Editor

Captain Charles P. Goforth, Jr.

Administrative Assistant

Ms. Helena Daidone

*The Army Lawyer* is published monthly by The Judge Advocate General's School. Articles represent the opinions of the authors and do not necessarily reflect the views of The Judge Advocate General or the Department of the Army.

*The Army Lawyer* welcomes articles on topics of interest to military lawyers. Articles should be typed double spaced and submitted to: Editor, *The Army Lawyer*, The Judge Advocate General's School, Charlottesville, Virginia, 22901. Because of space limitations, it is unlikely that articles longer than twelve typewritten pages can be published. If the article contains footnotes they should be typed on a separate sheet. Articles should follow *A Uniform System of Citation* (12th ed. 1976). Manuscripts will be returned only upon specific request. No compensation can be paid for articles.

Individual paid subscriptions are available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. The subscription price is \$9.00 a year, 80¢ a single copy, for domestic and APO addresses; \$11.25 a year, \$1.00 a single copy, for foreign addresses.

Funds for printing this publication were approved by Headquarters, Department of the Army, 26 May 1971. Issues may be cited as *The Army Lawyer*, [date], at [page number].

involved, instances where a tangible bid was mishandled after physical receipt.

While this may be the case, we believe that strict and literal application of the regulation should not be utilized to reject a bid where to do so would contravene the intent and spirit of the late bid regulation.<sup>6</sup>

Thus, the GAO took a clear rule, relatively easy to administer, and turned it into a guessing game. The contracting officer must now determine when acceptance of an otherwise late bid that does not meet the "strict and literal application of the regulation" will not "contravene the intent and spirit of the late bid regulation." Factual determinations formally limited in time by the requirement for physical receipt of the bid by the installation are expanded by the Hydro decision to include actions occurring during or before delivery to the government. The test of government mishandling is no longer limited to whether, after receipt, government employees failed to follow usual delivery procedures for bids, but now includes consideration of what federal employees did to frustrate delivery. This extended requirement for determining whether the government mishandled a bid, a neat trick when the government has yet to receive it, was graphically demonstrated in I&E Construction Company Incorporated (I&E).<sup>7</sup> That decision involved an attempt by Western Union to deliver a telegraphic modification to a bid. Bid opening was scheduled for 2 P.M. on 27 May 1976. At 12:24 A.M., on 27 May, Western Union received a telegraphic modification to I&E's previously submitted bid. Between 1:30 P.M. and 1:45 P.M. Western Union attempted to deliver the modification, but found the Purchasing and Contracting Office (P&C) closed. Western Union retained the modification and delivered it the next day. The modification, if timely, would have made I&E the low bidder. The modification was rejected as late. I&E protested to GAO. During the course of its consideration of the protest, GAO discovered that the P&C office was closed for a farewell party for an employee. The office reopened before bid opening time, but after 1:45 P.M. The GAO, relying upon Hydro Manufacturing Corporation

case, concluded that the modification should have been considered even though there was no government mishandling after receipt.

The GAO interpretation of the late bid rules requires contracting officers and their attorneys to consider more carefully the events leading up to late delivery of a bid or modification. Little help is available to them in the Comptroller General opinions. However, some basic concepts are discernable.

The government must be involved in the cause of the late delivery of a bid or modification. Further the government involvement must be the "paramount reason for the late receipt."<sup>8</sup> This requirement is demonstrated in the Surplus Tire Sales case,<sup>9</sup> a December 13, 1976, Comptroller General Decision. In that case, Surplus Tire submitted a bid on certain surplus government property. Bid opening was scheduled for 9 A.M., 13 August. At 10:57 P.M., 12 August, Surplus Tire placed a bid modification in the hands of Western Union for transmission to the government. Western Union attempted four times prior to bid opening time to transmit the modification to the contracting activity. Every attempt by Western Union to send the modification was met by the message that the government telex was "continuously busy or inoperable." Government witnesses established, however, that the government machines were operable and receiving messages. Based on this information, the contracting officer for the surplus sale rejected as late Surplus Tire's bid modification, which had finally arrived, but well after the bid opening. Surplus Tire protested the rejection arguing government mishandling. The Comptroller General denied the protest, saying:

[o]n the basis of the facts presented we [GAO] do not believe that Surplus Tire has proven the lateness of its modification to have been attributable to [the government], or even if, for the sake of argument, attributable to them that the government caused delay was the paramount cause of the late receipt.<sup>10</sup>

Additionally, even if government involvement in the cause of late delivery is found, the

late bid or modification cannot be accepted if it represents a danger to the competitive bidding system or would prejudice other bidders. A good example of this proposition is found in a recent Comptroller General opinion, Data Pathing Inc., on 5 May 1977.<sup>11</sup> Data Pathing submitted an offer on a Government Request for Proposals (RFP). Best and final offers were required to be submitted to Watervliet Arsenal by 4:00 P.M. on December 15, 1976. On December 15, 1976 Data Pathing's (DP) representative arrived at Watervliet's main gate at 3:54 P.M. DP's representative had been delayed by roadblocks set up because of sniper fire in the area. The guard at Watervliet's gate informed DP that there was insufficient time to reach the room designated for receipt of offers by 4:00 P.M. The guard also refused to call Watervliet contracting personnel to inform them that DP's offer was on the way. Consequently, DP's best and final offer was delivered late and was not considered by the contracting officer. DP protested urging the Comptroller General to apply the broad late bid exception established in the Hydro Fitting and I&E Construction Company decisions. This the Comptroller General refused to do. The Comptroller General's refusal was based in part on the fact that DP's offer remained in DP's possession *after* the time set for receipt of best and final offers. This contrasted directly with I&E Construction where the late modification was in the hands of Western Union *before* bid opening and remained with this "neutral" third party until delivery to the government. Hence, in DP's case the Comptroller General concluded:

[A]ny relaxation of the [late bid] rule when a best and final offer [or bid] remains in the offeror's custody after the closing date and time would inevitably create confusion and could give one offeror an advantage over the others who had less time to prepare their proposals.<sup>12</sup>

Perhaps the later Comptroller General's decisions, such as Data Pathing, Inc., presage a

narrowing of the rule laid down in Hydro Fitting Corporation. Certainly, the expanded government mishandling exception to the late bids rules, if kept at all, should be very narrowly applied. Every effort must be made to insure that as few subjective determinations as possible creep into the bidding process. By making the contracting officer a "judge" of when the government is the "paramount cause" of a late bid or modification, the Comptroller General has attacked one of the key building blocks erected by the ASPR to insure full and free competition. The GAO's confused and erratic view of the late bid rules increases the possibility of fraud and the certainty of confusion and endless protests in the bidding process.

### Notes

<sup>1</sup> The terms bid and modification are used interchangeably.

<sup>2</sup> Armed Services Procurement Regulation (ASPR), Section 7-2002.2 (1976 ed.). Late Proposal rules are essentially the same, as is the ASPR clause. See, ASPR §7-2002.4. The terms late bid and late proposal are used interchangeably in this paper.

<sup>3</sup> The terms General Accounting Office and Comptroller General are used interchangeably.

<sup>4</sup> Comp. Gen. Dec. B-187322, Dec. 13, 1976, 1976-2 C.P.D. ¶ 479, *reconsideration*, Comp. Gen. Dec. B-187322, Feb. 28, 1977, 1977-1 C.P.D. ¶ 145.

<sup>5</sup> Comp. Gen. Dec. B-183438, June 2, 1975, 1975-1 C.P.D. ¶ 331.

<sup>6</sup> *Id.*, at 5.

<sup>7</sup> Comp. Gen. Dec. B-186766, Aug. 9, 1976, 1976-2 C.P.D. ¶ 139.

<sup>8</sup> Comp. Gen. Dec. B-187322, Dec. 13, 1976, 1976-2 C.P.D. ¶ 479, *reconsideration*, Comp. Gen. Dec. B-187322, Feb. 28, 1977, 1977-1 C.P.D. ¶ 145.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 3. See also, Comp. Gen. Dec. B-186794, Nov. 11, 1976, 1976-2 C.P.D. ¶ 402.

<sup>11</sup> Comp. Gen. Dec. B-188234, May 5, 1977, 1977-1 C.P.D. ¶ 311.

<sup>12</sup> *Id.*, at 3-4.

## Problem Areas in Prompt Payment Discounts

*Captain Craig Schnee, Contract Appeals Division, USALSA*

In order to properly advise contracting officers, procurement attorneys must understand the most commonly litigated areas of prompt payment discount law. This article provides guidance through a brief examination of current decisions in these areas. These troublesome areas are 1) the interpretation of the phrase "correct invoice or voucher" used in the standard discount clause,<sup>1</sup> 2) the effect of the contractor's failure to provide documentation required to support the invoice, and 3) the response required by the government when in receipt of an erroneous invoice.

### WHAT IS A "CORRECT INVOICE VOUCHER"?

Before 1974 the phrase "correct invoice or voucher" as it is used in the standard discounts clause appeared to mean an invoice or voucher which was correct in *all* respects, including the amount of payment requested. This interpretation was based not only on the clear language of the discounts clause but also decisions of the Court of Claims and the Armed Services Board of Contract Appeals.<sup>2</sup> Until the invoice or voucher was correct, the discount period did not begin to run.

In *Old Atlantic Services*, ASBCA No. 18108, 74-1 BCA of 10494 (1974), the Board took a different approach.<sup>3</sup> That appeal involved a claim by a contractor for refund of a discount taken by the government under Armed Services Procurement Regulation § 7-103.14. The contractor had submitted invoices for services rendered. The invoices demanded payment of a larger sum of money than that to which the government admitted contractor was entitled, and contractor refused the finance office's request to correct the invoices. Although the government did not make payment within 20 days of receipt of the invoices as the discounts clause required, the discount was nevertheless taken. The government took the position that the discount period did not begin to run until a correct invoice was submitted, and that con-

tractor's invoice was never correct because the wrong sum of money was demanded.

The Board, however, sustained the appellant's appeal, refunding the discount taken by the government. The Board found that an invoice was not incorrect simply because contractor demanded payment of a greater amount than the government admitted was due, stating at page 49,686:

We find no basis in the contract for holding that a contractor's invoice must be in the exact amount ultimately found to be legally due and payable or in the amount admitted by the Government to be due, in order to be correct for discount purposes.

The Board distinguished *Thomas Somerville Co. v. United States*, *supra* note 2, by stating that in that case the court had discussed the two prevalent government methods of dealing with contractor invoices which requested payment of an erroneous sum of money. In one instance, after receipt of the invoice the department would compute the proper amount due and make payment of this amount. This procedure was required by AR 37-107 in the present appeal.<sup>4</sup> In the second instance, the practice was to return the invoice to the contractor with an identification of the error and to request a correct invoice. This procedure was followed in *Somerville*, *supra* note 2. The Board found that the court's decision implied that a different result might have been reached had the former method of dealing with incorrect invoices been practiced by the department involved, and based its decision on this distinction.

Although the Board in *Old Atlantic Services* refused to express an opinion as to whether other errors or omissions on the face of a contractor's invoice would cause it to be incorrect for purposes of the discount clause, an earlier appeal is of some guidance here.

In *Maryland Wiping Cloth*, *supra* note 2, the contractor presented an invoice which de-

manded payment of an amount greater than that to which contractor was entitled, and contained errors in contractor's title and signature. The government did not pay within the discount period but nevertheless took the discount, asserting that the discount period had not begun to run because contractor's invoice was not correct. The Board found for contractor on alternative grounds but impliedly accepted the government's argument that the contractor's invoice was not correct.

Although the Board's decision in *Old Atlantic Services* nullifies the implication that an invoice is not correct if the wrong sum of money is demanded, the Board's express restriction of its decision on that point leaves intact that portion of the decision in *Maryland Wiping Cloth*, *supra* note 2, finding a contractor's invoice incorrect for want of a proper signature or firm title. Furthermore, the reasoning which the Board followed in rendering its decision in *Old Atlantic Services* is not applicable to the situation where the invoice is incorrect for other reasons (*i.e.*, that the finance office was required by regulation to treat an invoice demanding an improper sum of money as though correct and pay the proper amount).

#### SUPPORTING DOCUMENTATION FOR INVOICES

In some instances the contract may require that certain supporting information or documentation be conveyed to the government before payment of the contractor's invoice can be made. These situations usually arise if information or documentation is necessary to determine the final contract price. For example, the F.O.B. Destination—Evidence of Shipment Clause<sup>5</sup> requires that receipted commercial bills of lading be furnished by the contractor; master ship repair contract specification worksheets require submission of contractor's material invoices; and the Economic Price Adjustment clause<sup>6</sup> requires substantiation.

Several Comptroller General decisions have discussed the problem which may arise in relation to the discount clause.<sup>7</sup> The factual situations are similar. In the usual situation a con-

tractor has a contractual obligation to provide documentation (other than line items) to the government. The contractor fails to do so but invoices the government for payment. The government delays payment beyond the discount period until the required documentation is received, and then takes the discount. In these situations the Comptroller General has stated, and the Board tacitly agreed,<sup>8</sup> that the government is entitled to take the discount because of contractor's initial failure to meet its contractual obligation.

However, the requirement that the contractor provide additional documentation must be clear and contractual. In a recent decision, *Braswell Shipyards, Inc.*, *supra* note 8, the Board was presented with a situation where the contractor was required by specification worksheets (not part of the formal contract document) to provide material invoices. The Board held there that even though a note on the specification worksheets required a contractor to provide these documents, the note did not create a contractual obligation upon contractor and the government's failure to pay the invoice until these documents were received caused it to lose the discount.

#### NOTIFYING CONTRACTORS OF INCORRECT INVOICES

Assuming an incorrect invoice is received which prevents the discount period from running, the government may not retain the invoice without notifying the contractor of the problem. Rather, the government must either return the invoice for correction or request a correct copy within a reasonable time.<sup>9</sup>

This position was demonstrated in *Maryland Wiping Cloth*, *supra*, note 2. In that appeal, the contractor submitted an invoice which was incorrect. Although it was received by the government in late May, 1954, the government did not inform contractor that its invoice was incorrect until mid-July, 1954. The government received a corrected invoice on 19 July 1954 and made payment 29 July 1954, taking the discount. The government claimed that the discount period did not begin to run until the cor-

rected invoice was received. However, the Board held that the government was not entitled to the discount, stating that it did not believe that the discount provision entitled the government to withhold action as to errors on the invoice, for such time as suited its convenience.

### CONCLUSION

The Contracting Officer is justified in taking the prompt payment discount after the discount period has run if 1) the contractor fails to provide supporting documentation required by the contract, and 2) the government promptly informs the contractor of its invoice deficiencies. In addition, it appears that the contracting officer may reasonably rely on case law to take the discount after the discount period has elapsed where contractor's invoice does not correctly set forth other required information. The government must promptly inform the contractor about his invoice deficiencies.

Although the contracting officer may not take the discount merely because the contractor has demanded payment of an incorrect sum of money, he may take Prompt Payment discounts from amounts paid out in progress payments even though the final bill is not paid within the discount period. This is no more than a refund or off-set of amounts which the government otherwise has a duty to seek even though the normal time for taking the discount has run.<sup>10</sup> This is true, said the ASBCA, because "progress payments remitted to the contractor are clearly prompt payments of a portion of the total contract price, having been

made prior to delivery of the contract items."<sup>11</sup>

### Notes

<sup>1</sup> Armed Services Procurement Reg. § 7-103.14.

<sup>2</sup> Thomas Somerville Co. v. United States, 99 Ct. Cl. 329 (1943); Carolina Paper Mills, Inc., ASBCA No. 4488 et al., 58-2 BCA 1832 (1958); Harold E. Sutton d.b.a. Best Janitorial Services, ASBCA No. 7707 et al., 1963 BCA 3782 (1963); C.F. Maryland Wiping Cloth, ASBCA No. 3269, 56-2 BCA 1002 (1956).

<sup>3</sup> See also Permaloy Corp., ASBCA No. 19031, 74-2 BCA para. 10,974 (1974).

<sup>4</sup> Army Reg. No. 37-170, para. 5-24 states:

*c. Action on Claim for Items Not Received.* When quantities of items have been contracted for and when a portion of such items is not received but the vendor submits an invoice for the total amount, the finance and accounting officer will

(1) Make the necessary adjustment on the face of the invoice or voucher.

(2) Pay the reduced amount.

(3) Furnish the vendor a copy of the invoice or voucher on which the adjustment is made.

<sup>5</sup> Armed Services Procurement Reg. § 7-104.76.

<sup>6</sup> Armed Services Procurement Reg. § 7-107.

<sup>7</sup> 76-1 CPD para. 282, Dec. B-184999 dated 27 Apr. 1976; Comp. Gen. unpubl. decision B-99268 dated 10 Jan. 1951, 5CCF para. 61,204.

<sup>8</sup> Braswell Shipyards, Inc., ASBCA No. 21516, 77-1 BCA 12,366 (1977).

<sup>9</sup> C.F. U.C.C. § 1-204.

<sup>10</sup> Metadyre Corp., ASBCA No. 21327, 77-1 BCA 12,477 (1977).

<sup>11</sup> *Id.* at 60,492.

## Recent Developments in the Taxation of a Military Service Member's "Interest" in Government-Furnished Housing

*Procurement Law Division, Tax and Property Law Branch, OTJAG*

Recently there has been considerable publicity within the military services concerning the possible application of the January 1977 United States Supreme Court decision, *United States v. Fresno County*, 429 U.S. 452 (1977), to military housing. *Fresno* involves civilian employees of the United States Forest Service, a part of the United States Department of Agriculture, occupying quarters in National Forests. The employees were required to live in these quarters so that they would be near to the place where they performed their duties. The quarters were furnished as partial compensation for the services of these employees and deductions based upon an estimate of the fair rental value of similar housing in the private sector were taken from the employee's salary. Fresno County, under California Revenue and Taxation Code §§ 104 and 107 and § 21(b) of Title 18 of the California Administrative Code, imposed its annual use or property tax on the employee's "possessory interest" in this tax-exempt housing. The issue was whether California's taxation of the federal employee's "possessory interest" in this housing violated the federal government's immunity from state taxation inherent in the Supremacy Clause of the United States Constitution and the Court held that it did not. The "legal incidence" of the tax was found to fall on the private citizen working for the federal government, rather than on the government itself. According to the Court, the only threatened interference with the function of the Forest Service would be to the extent that the tax might impose an economic burden on the Forest Service, *i.e.*, by requiring the Forest Service to reimburse its employees for the taxes legally owed by them or, failing reimbursement, by removing an advantage otherwise enjoyed by the federal government in the employment market. The Court, further, found no discrimination against the Forest Service or other federal employees.

The opinion of the Court frequently uses the

phrase "private citizens" in referring to these civilian federal employees. That, no doubt, shows an appreciation by the Court of the special circumstances surrounding the military occupancy of government-furnished quarters. Justice Stevens, however, in his dissent, stated that ". . . I would suppose the State could tax a soldier's use of Army barracks if the State also taxed its police officers whenever they resided in State quarters."

Two counties in California are attempting to reach a military member's possessory interest in his government-furnished housing: Navy housing at the United States Naval Facility Centerville Beach, Ferndale in Humboldt County and Air Force housing at Beale Air Force Base in Yuba County. The Army has joined the Navy and Air Force in requesting that the United States Department of Justice bring suit to distinguish *Fresno* and verify its inapplicability to military service members. We are advised that, as of the date of this writing, suit has been filed with respect to Humboldt County and that suit will be filed shortly with respect to Yuba County. In the Humboldt County Action, the government has alleged that the imposition of the tax on military service members is unlawful for the following reasons:

(1) the imposition is a direct interference with the operations of the United States government;

(2) the housing in question is Capehart Housing and Congress had declared such housing immune from such tax;

(3) Section 514 of the Soldiers' and Sailors' Civil Relief Act forbids such a tax with respect to a military service member whose legal residence (domicile) is other than Humboldt County and who is absent from his legal residence solely by reason of military orders.

In addition, the Township of Old Bridge, New Jersey has attempted to impose its annual property tax on the "leasehold" interest of military service members in their government-furnished housing. At Army request, the Department of Justice has also filed suit there to enjoin the tax. The court has issued a Temporary Restraining Order which by stipulation of the parties has been extended until argument on the merits. In our judgment, the Township's reliance on *Fresno* is totally without merit in that the statutory basis for the imposition in New Jersey is substantially different. While California has a property tax statute which historically has reached a lesser interest in real property, a "possessory interest", the New Jersey statute is a "leasehold"-type statute and, of course, the service member does not

have a lease in his military housing.

It is important for Army Judge Advocates to be alert to the possibility of additional *Fresno*-type assessments against military members and to advise OTJAG (ATTN: DAJA-PL) as soon as possible. *A word of caution:* These assessments are usually against the individual service member and not the Army directly. Therefore, every effort must be made to expedite the referral to OTJAG in order to obtain coordination and direction on the handling of these very sensitive cases. Delay in obtaining proper advice may work a hardship on the individual member because, for example, the member may lose state law appeal rights, the period for challenging valuation may expire, or for some reason the Justice Department may decide not to take the case.

### **Military Justice Reporter Replaces JALS**

*Reserve Affairs Department, TJAGSA*

As outlined in the June issue of *The Army Lawyer* and in DA Pam 27-77-3, the last issue of the *Judge Advocate Legal Service (JALS)*, The Judge Advocate General's School has ceased publication of the JALS effective 3 August 1977 and West Publishing Company has begun publishing the *Military Justice Reporter (M.J.)*. West anticipates putting out three bound volumes per year in addition to the ongoing advance sheets.

The Reserve Affairs Department, TJAGSA, has requested that Office Chief, Army Reserve provide funds to purchase copies of the *Military Justice Reporter* for all Military Law Centers,

and for Court-Martial Trial and Defense Teams, not co-located with a Military Law Center. West is currently selling the *Military Justice Reporter* for \$40.75 per bound volume (includes advance sheets). The yearly subscription price for the three volume set plus advance sheets is \$122.25. The cost for advance sheets only is \$50.00. Units other than Military Law Centers and Court-Martial Trial and Defense Teams which are interested in a yearly subscription for either bound volumes or the advance sheets should contact West Publishing Company, 50 West Kellogg Boulevard, P.O. Box 3526, St. Paul, Minnesota 55165 (ATTN: Mr. Bill Levine).

### **Reserve Component Technical Training (On-Site) Schedule**

*Reserve Affairs Department, TJAGSA*

The schedule which follows sets forth the subject, date, and city of the on-site training to be presented in academic year 1977-78. Also included is a list of the local "action officers" and the training site location for each unit.

Reserve Component officers who do not receive notification of the on-site program through their unit of assignment are encouraged to confirm the date, time and location of the scheduled training with the action officer.

As with previous training, coordination should be initiated with units other than JAGSO detachments and with members of the Individual Ready Reserve (IRR) to provide maximum opportunity for interested JAG officers to take advantage of this training. In addition, all active duty JAGC officers assigned to posts, camps and stations located near the scheduled training site are encouraged to attend the sessions.

Detachment commanders who have not already done so are requested to amend their unit training schedule to conform to the published schedule. For those units performing OJT at various posts, it may be necessary to advise the SJA involved that your unit may not be available for OJT during the day of the "on-site" training.

Reserve Component JAG Corps officers assigned to troop program units other than Judge Advocate General Service Organizations should advise their commander of the "on-site" training and request equivalent training for unit assemblies during the month of the technical training.

Questions by local Reserve Component officers concerning the on-site instruction should be directed to the appropriate action officer. Problems encountered by action officers or unit commanders should be directed to Captain Rob Walker Freer, Reserve Affairs Department, The Judge Advocate General's School, Charlottesville, Virginia 22901. Captain Freer's telephone numbers are commercial (804) 293-6121 and AUTOVON 274-7110, extension 293-6121.

<i>City</i>	<i>Date &amp; Times</i>	<i>Subject</i>	<i>Action Officer Phone</i>	<i>Training Site Location</i>
1 Norfolk	10 Sep 77 0800-1200	Criminal Law	MAJ Robert L. Bohannon 804-622-6357	29th and Gazelle Street Armory
2 Little Rock	5 Nov 77 0800-1700	International Law Criminal Law	MAJ Don Langston 501-785-2326	Seymour Terry Armory
Kansas City	6 Nov 77 0800-1700	Criminal Law International Law	LTC Thomas Graves 816-474-0666	Long USAR Center
3 Austin	5 Nov 77 0800-1700	Criminal Law International Law	MAJ Charles Sebesta 713-567-4362	USAR Center
Dallas/Ft. Worth	6 Nov 77 0800-1200	Criminal Law	MAJ Virgil A. Lowrie 817-387-3831-Ext 222	Muchert Reserve Center
Baton Rouge	6 Nov 77 0800-1200	International Law	MAJ James B. Thompson 504-927-9301	Saurage USAR Center
4 Los Angeles	12 Nov 77 0800-1700	Criminal Law Admin & Civ Law	MAJ Cliff Larson 213-688-4664	JAG Office Fort MacArthur
Phoenix (to include Tucson)	13 Nov 77 0800-1700	Criminal Law Admin & Civ Law	MAJ Daniel F. McIlroy 602-262-3431	Will Barnes USAR Center
5 New Orleans	19 Nov 77 0800-1700	Criminal Law Admin & Civ Law	CPT Stanley Millan 504-865-1121-Ext 252	USAR Center 5010 Leroy Johnson Drive
Jackson, MS	20 Nov 77 0800-1700	Criminal Law Admin & Civ Law	LTC Edward Cates (601) 948-2333	U.S. Army Reserve Training Center
6 Orlando	3 Dec 77 0800-1200	Criminal Law	COL Theodore H. VanDeventer 305-656-1753	TAFT USAR Center
Tampa	3 Dec 77 0800-1200	International Law	MAJ James L. Livingston 813-385-5156	USAR Center St. Petersburg
Miami	4 Dec 77 0800-1700	Criminal Law International Law	LTC Alden N. Drucker 305-538-1401	5601 San Amaro Drive Coral Gables, FL

<i>City</i>	<i>Date &amp; Times</i>	<i>Subject</i>	<i>Action Officer Phone</i>	<i>Training Site Location</i>
7 Houston	7 Jan 78 0800-1700	Criminal Law Admin & Civ Law	MAJ Donald M. Bishop 713-666-8000	Annex Bldg
San Antonio	8 Jan 78 0800-1700	Criminal Law Admin & Civ Law	MAJ John Compere 512-225-3031	2010 Harry Wurzbach Road USARC
8 Inkster	28 Jan 78 0800-1200	Procurement Law	LTC Cay A. Newhouse 313-264-1100-Ext 2465	Raymond Zussinson USAR Center
Minneapolis	28 Jan 78 0800-1700	Criminal Law Admin & Civ Law	MAJ Robert M. Frazee 612-338-0661	Marriott Hotel Bloomington, MN
Chicago	29 Jan 78 0800-1700	Criminal Law Admin & Civ Law Procurement Law	CPT John C. Jahrling 312-829-4334	Moskala USAR Center
9 Seattle	4 Feb 78 0800-1700	Criminal Law Admin & Civ Law International Law	LTC John P. Cook 206-624-7990	Harvey Hall Fort Lawton
San Francisco	5 Feb 78 0800-1700	Criminal Law Admin & Civ Law International Law	LTC Robert J. Smith 415-961-3300	Bldg #1750, Golden Gate Reserve Center Presidio
Honolulu	7-8 Feb 78 1900-2300	Criminal Law Admin & Civ Law International Law	COL Donald C. Machado 808-438-9953	Bruyeres Quadrangle
10 Atlanta	11 Feb 78 0800-1700	Criminal Law Admin & Civ Law	CPT Robert A. Bartlett 404-521-2268	Chamblee Armory
11 Tulsa	25 Feb 78 0800-1700	International Law Procurement Law	LTC Arthur W. Breeland 918-582-5201	USAR Center
Memphis	26 Feb 78 0800-1200	Procurement Law	MAJ Robert G. Drewry 901-526-0542	Marine Hospital
Albuquerque	26 Feb 78 0800-1200	International Law	LTC John McNett 505-264-7265	Bldg #327, Kirtland AFB
12 Salt Lake City	4 Mar 78 0800-1700	Criminal Law Admin & Civ Law	LTC G. Gail Weggeland 801-524-5796	Menninger USAR Center
Topeka	5 Mar 78 0800-1700	Criminal Law Admin & Civ Law	MAJ Donald Simons 913-296-3831	Bldg #107 Fort Douglas, Utah
13 Harrisburg	11 Mar 78 0800-1200	Criminal Law	LTC Harvey S. Leedom 717-782-6310	Bldg #442 New Cumberland Army Depot
14 Louisville	11 Mar 78 0800-1700	Criminal Law Procurement Law	LTC Martin F. Sullivan 502-587-0145	Hangar #7, Bowman Field
Denver	12 Mar 78 0800-1700	Criminal Law Procurement Law	LTC Bernard Thorn 303-573-7600	I-332, Fitzsimons Army Medical Center
15 Columbus	11 Mar 78 0800-1700	Criminal Law Admin & Civ Law	CPT John F. Bender 614-890-1590	Army Reserve Center
Cleveland	12 Mar 78 0800-1700	Criminal Law Admin & Civ Law	MAJ David E. Burke 216-623-1350-Ext 2006	Mote USAR Center
16 New York	18 Mar 78 0800-1700	Criminal Law Admin & Civ Law International Law	LTC Michael Bradie 516-295-3344	Patterson USAR Center

City	Date & Times	Subject	Action Officer Phone	Training Site Location
Boston	19 Mar 78 0800-1700	Criminal Law Admin & Civ Law International Law	MAJ Peter F. MacDonald 617-583-2019	Boston USAR Center
17 Indianapolis	8 Apr 78 0800-1200	Criminal Law	COL Theodore Wilson 317-923-4573	Boros Hall
St. Louis	9 Apr 78 0800-1200	Criminal Law	CPT Robert L. Norris 314-278-6191	Training Center #1
18 Richmond	22 Apr 78 0800-1200	Procurement Law	LTC Robert L. Masden 804-786-3001	Michelli USAR Center
19 Washington, D.C.	23 Apr 78 0800-1700	Criminal Law Admin & Civ Law International Law Procurement Law	MAJ George R. Borsari 202-296-8900	Southern Maryland Memorial USAR Center
San Juan, PR	24-25 Apr 78 1900-2300	Criminal Law Admin & Civ Law International Law Procurement	COL Ishmael H. Herrero, Jr. 809-783-2500	Conference Room HQ PR NG
20 Columbia, S.C. (to include Spartan- burg)	29 Apr 78 0800-1700	Criminal Law Admin & Civ Law	LTC Hugh Rogers 803-359-2599	Forest Drive Armory
Birmingham	30 Apr 78 0800-1700	Criminal Law Admin & Civ Law	LTC George Reynolds 205-325-5332	142 W. Valley Avenue
21 Pittsburgh	6 May 78 0800-1700	Criminal Law Admin & Civ Law	MAJ James A. Lynn 412-434-3709	Gen Malcom Hay Armory
Philadelphia	7 May 78 0800-1700	Criminal Law Admin & Civ Law	CPT Donald Moser 215-925-5800	USAR Training Center Willow Grove, PA

## Reserve Affairs Section

### *Reserve Affairs Department, TJAGSA*

- 1. Court-Martial Defense Team Training.** Training for JAGSO Court-Martial Defense Teams will be conducted 10 July-21 July 1978 at TJAGSA.
- 2. BOAC Phase IV and the Reserve Compo-**

**ment General Staff Course.** TJAGSA will also be the site for BOAC Phase IV (Administrative and Civil Law) and the Judge Advocate General Reserve Component General Staff Course 19 June-30 June 1978.

## Professional Responsibility

### *Criminal Law Division, OTJAG*

- 1. The OTJAG Professional Ethics Committee** recently considered a case involving the question whether a trial defense counsel knowingly made a false statement concerning service of the SJA review and presentation of a petition

for clemency. The pertinent provision of the *ABA Code of Professional Responsibility* considered by the Committee is Disciplinary Rule (DR) 7-102(A)(5), which states "(A) In his representation of a client, a lawyer shall not: (5)

Knowingly make a false statement of law or fact."

The trial defense counsel, CPT *D* represented his client at a general court-martial. The accused was acquitted of possessing 1,000 grams of hashish at the German/Dutch border and, in accordance with his plea, found guilty of a border pass violation. CPT *D* prepared a petition for clemency which was included with the SJA review for submission to the convening authority. Approximately eight months later, CPT *D* submitted a brief under Article 38(c), U.C.M.J., in which he stated that he had not been served with a copy of the SJA review and that the division commander had not seen the request for clemency. Both statements were incorrect, as the record reflected that CPT *D* had received the SJA review and his request for clemency was a part of the record considered by the convening authority.

When confronted with the facts, CPT *D* acknowledged his error. He stated that, contrary to his usual practice, he apparently had not retained a copy of the SJA review in the case. He explained that the factual representations in the Article 38(c) brief were made in good faith and that he regretted his error in this case. CPT *D*'s assertion of good faith was substantially corroborated by the appellate defense counsel who called him about the error.

The Committee concluded that CPT *D* had acted in good faith and that no ethical violation occurred. It was found that CPT *D* negligently prepared a brief which was in error, because he failed to initiate an investigation to explain his lack of a copy of the documents. The Committee determined that CPT *D*'s inattention to detail and his willingness to make unsupportable allegations, although not unethical in this case, was conduct which reflected adversely on him and for which he should be counseled.

2. The OTJAG Professional Ethics Committee recently considered a case involving allegations that a division staff judge advocate (SJA) had exerted improper influence over another officer in connection with an inspector general (IG) investigation. The pertinent provisions of the *ABA Code of Professional Responsibility* con-

sidered by the Ethics Committee are: Ethical Consideration (EC) 2-3, Disciplinary Rule (DR) 2-104, Canon 5, DR 7-104, or DR 7-109 coupled with DR 1-102(A)(2).

The case arose when the position of division provost marshal became vacant. LTC *B* and LTC *R* were competitors for the position. LTC *R* was appointed to the job. Shortly afterwards he was accused by several enlisted women of intemperance and promiscuity. The division IG investigated and determined that the allegations were unsubstantiated. The Report of Investigation (ROI) stated that LTC *B* had spread malicious rumors about his rival, LTC *R*, and used CID assets to put LTC *R*'s quarters under surveillance. As a result, LTC *B* received an adverse officer efficiency report.

LTC *B*'s complaints about these events resulted in a corps IG investigation, major command IG investigation, correspondence from LTC *B* to TJAG, and congressional inquiries. Although the corps IG concluded that the division ROI was defective, this did not satisfy LTC *B* who wanted complete vindication.

While the corps IG investigation was in progress, the assistant division commander called LTC *S*, the division SJA. He told LTC *S* that he was concerned about LTC *B*'s preoccupation with IG matters to the detriment of his duties, and possible adverse effects on LTC *B*'s assignments and career. LTC *S* volunteered to talk to LTC *B*, but before doing so he discussed the matter with LTC *B*'s counsel.

There were two versions of the conversation between LTC *B* and LTC *S*, neither of which could be corroborated. LTC *B* claimed that LTC *S* came to him, stated that he worked for the division and the assistant division commanders and did not want to see them in any trouble, and attempted to influence him not to provide any more evidence to the corps IG. In short, LTC *B* viewed the approach as an attempt on behalf of the division and the assistant division commanders to squelch his attempts to air his complaints about LTC *R* and thus obtain his own vindication.

According to LTC *S*, he approached LTC *B*

merely as a concerned fellow officer, who could see that a capable officer was damaging his career by entering into an imbroglio without end. LTC S denied he was acting in a representative capacity or attempting to thwart the IG investigation. LTC S stated that he believed that LTC B would never permit an orderly resolution of the case. He believed it desirable that the issues be finally settled, and that LTC B end what amounted to career suicide.

The Committee determined that no ethical violation was shown. One aspect of Canon 2, as reflected in EC 2-3 and DR 2-104, is a lawyer's volunteering unsolicited advice. The Committee concluded that there is no prohibition against giving personal advice even if one happens to be a lawyer. The Committee determined that LTC S had not approached LTC B in the capacity of legal representative of another or to advise him as a legal counsel. This being so, no violation of Canon 5 relating to

conflicts of interest or multiple representation was found.

Although LTC B interpreted the conversation with LTC S as an attempt to suppress evidence, the Committee found no evidence to support this interpretation or that any improper remarks were made by LTC S. Therefore, the Committee decided there was no violation of Canon 7, nor any attempted circumvention by suppression of evidence through LTC B in violation of DR 1-102(A)(2).

The Committee recommended that the case be closed because no ethical violation was found. (Nevertheless, the case illustrates the misunderstandings that arise when a lawyer gives unsolicited personal advice, especially to one who has a fervent sense of grievance. Minding one's own business is usually the best course of action.)

### The Competency of Counsel

*Lieutenant Colonel Leonard R. Piotrowski and  
Captain Vaughan Taylor, Criminal Law Division, TJAGSA*

*This is the third in a series of articles pertaining to the right of counsel in the military. For parts one and two, see The Army Lawyer, December 1976 and March 1977.*

The accused is entitled to the effective assistance of competent counsel in preparation for, and throughout the trial and on appeal.<sup>1</sup>

Historically, the physical presence of counsel was probably considered sufficient, and the cliché "you get what you pay for" was an unwritten premise of the early development of the right to counsel. The courts, however, soon found such unwritten precedent unacceptable and fashioned in legal terminology a rule more oratorically pleasing but of less practical significance. That rule of the nineteen-fifties said a defense counsel was considered adequate by the appellate courts unless it was established that the

proceedings were so erroneous as to constitute a ridiculous and empty gesture or were so tainted with negligence or wrong-

ful motives on the part of counsel as to manifest a complete absence of judicial character.<sup>2</sup>

Any attempt to distinguish between retained and appointed counsel regarding adequacy is gradually disappearing in the civilian courts<sup>3</sup> and the wisdom of the military courts in never creating such a dichotomy is constitutionally and logically sound.<sup>4</sup> The fact that the proceedings were a sham, a farce, or a mockery of justice, hardly permit a distinction as to whether created by a paid or free counsel. Furthermore, these terms do not appear to be an adequate articulation of the constitutional protection afforded an accused. Earlier than the civilian courts, and with a more certain sense of movement, the military courts began a shift towards a factual determination of adequacy.<sup>5</sup> Beyond

more than a "ridiculous gesture" being required, gross errors in judgment or cumulative minor errors can now constitute inadequate representation requiring reversal.<sup>6</sup>

By 1972 a modern rule had become firmly entrenched as a guideline for the conduct of defense counsel at the trial level, as Judge Quinn stated in *United States v. Walker*, "We assume that the accused is entitled to the assistance of an attorney of reasonable competence whether that attorney is one of his own selection or appointed for him."<sup>7</sup> The court quoted with approval other phraseology that provides a better sense of the test: "the exercise of the customary skills and knowledge which normally prevails . . . within the range of competence demanded of attorneys in criminal cases."<sup>8</sup>

Since that time, the courts of military review have attempted to further refine the applicable standard pertaining to the effective assistance of counsel. In *United States v. Schroder*,<sup>9</sup> Judge Thomas found that the adequacy of counsel "was equal 'to the customary skill and knowledge which normally prevails' in other records of trial that come before this court." In *United States v. Gaillard*,<sup>10</sup> the court stated that the right was to "counsel reasonably likely to render and rendering effective assistance." The court felt in this case that the defense counsel had not worked to his capacity on the accused's behalf and therefore returned the case for a limited rehearing.<sup>11</sup>

By adopting a reasonable competence standard that is defined in terms of a defense attorney's effectiveness, the courts have given the right to counsel a practical application that protects defendants. Although the principle is acceptable, defining reasonable competence in terms of effectiveness remains a difficult task that can only be accomplished through an analysis of the facts of the cases from which that standard was derived.

In *United States v. Parker*<sup>12</sup> the defense counsel's representation was held to be inadequate where he only interviewed the accused once before trial, his cross examination of prosecution witnesses which brought out evidence damaging to the accused revealed that he

had not interviewed these witnesses prior to trial, he made no use of voir dire or challenges; although the court was specially selected, he repeatedly failed to object to objectionable testimony, he did not request any instructions and took no exceptions to the instructions given; he presented no evidence on the merits even though he suggested that a confession was obtained improperly; he put in no evidence to support his argument, and he made no attempt to avoid the death penalty.

In *United States v. Allen*,<sup>13</sup> the Court of Military Appeals adopted a "factual" rule by remanding the case to the Army Board of Review for a determination of whether the defense counsel acted adequately in deciding not to present any evidence or make any argument on the accused's behalf during the sentencing portion of trial. In appealing this desertion case, the accused alleged inadequate representation, contending that extenuation and mitigation evidence did exist in the person of his wife for whom, he said, he left the service to support during pregnancy, after being denied leave.

In *United States v. Kloepfer*<sup>14</sup> the Army Court of Military Review applied the reasonable competence standard by measuring the effectiveness of a defense counsel prior to trial. The court held that the defense attorney's conduct with respect to a polygraph examination of the accused was so grossly negligent as to constitute a denial of effective assistance of counsel. Before seeing the accused counsel advised a CID agent that the accused would submit to a polygraph examination and, without determining the nature of all the questions to be asked, he instructed the accused to answer the examiner's questions and left the office where the examination was to take place without attempting to stay with the accused or to monitor the examination through an existing mirror and headphone system. The examiner's questioning ultimately resulted in the accused's making numerous incriminating admissions.

In *United States v. Burwell*,<sup>15</sup> the Army Court of Military Review found a defense counsel's trial performance to be inadequate where

his 36-word argument on findings admitted guilt to a contested charge of aggravated assault and failed to point out substantial issues on the other charge of robbery and in *United States v. Rowe*<sup>16</sup> the Court of Military Appeals held that a defense counsel was inadequate for failing to bring out on extenuation and mitigation that the accused had medals he gained in Vietnam service, in spite of the fact that they were worn by the defendant during trial.

In *United States v. Richardson*<sup>17</sup> the Court of Military Appeals found a defense counsel inadequate for conceding that the Army would probably be better off without the accused for whom he contended a BCD was appropriate and just punishment, when the record contained no evidence that the accused wanted a discharge.

In *United States v. Blunk*,<sup>18</sup> the Court of Military Appeals held that when a defense counsel is instructed by the accused not to present anything in extenuation and mitigation, the attorney is bound by the accused's desires. However, the court said that the proper procedure in such a situation is for the defense counsel to have the accused execute a statement prior to trial reflecting his wishes, which should be kept by the defense counsel for his own protection and for utilization in situations of this type.

Recently, in *United States v. Palenius*<sup>19</sup> the Court of Military Appeals has removed any doubt concerning the applicability of the right to effective counsel in post-trial matters. The facts indicate that trial defense counsel advised the accused that appellate defense counsel would do him no good and delay appellate review. Because of this improper advice a new review by the Court of Military Review was ordered.

The court, however, used this case as a vehicle to indicate the duties incumbent upon trial defense counsel which specifically include the right to appellate representation and the appellate process of thorough examination of the record of trial; the appropriateness of the sentence; review of the staff judge advocate's advice; petitions for modification or reduction of

sentence; deferment; informing appellate counsel of primary issues, and doing whatever else is appropriate.<sup>20</sup>

The military has again taken a giant step forward to plug a practical gap in providing total protection for an accused. The court has set specific duties and general guidelines and removed any doubt concerning the continued obligation of the trial defense attorney.

A litany of rights and wrongs, gross errors or cumulative errors, misadvice or non-advice could be utilized to assist the neophyte in the courtroom but I believe that in terms of guidelines, each accused whose freedom is in jeopardy has a right to:

- (1) an attorney with a reasonable degree of competence;
- (2) an attorney who exercises that competence on the client's behalf; and
- (3) an attorney who has not exercised his skills in an illegal, improper, or manner detrimental to the accused.

These criteria in effect, test the knowledge of the attorney, the application of that knowledge on the client's behalf, and the protection of the rights of the accused, after the factual application of the skills.

Few trials will be free from some defense errors in judgement and a counsel will not be found inadequate solely because he did not adopt what only the hindsight of an appellate court can determine to be the best course of action. As long as the defense counsel is reasonably effective he will be deemed an adequate protector of the accused it is his job to defend. In the preparation for and conduct of any trial, a defense counsel will be safe in heeding the American Bar Association's standard for the Defense Function:

The basic duty the lawyer for the accused owes to the administration of justice is to serve as the accused's counsellor and advocate with courage, devotion, and to the utmost of his learning ability, according to law.<sup>21</sup>

## Notes

- <sup>1</sup> United States v. Walker, 21 C.M.A. 376, 45 C.M.R. 150 (1972).
- <sup>2</sup> United States v. Hunter, 2 C.M.A. 37, 6 C.M.R. 37 (1953).
- <sup>3</sup> 74 A.L.R.2d 1390.
- <sup>4</sup> United States v. Walker, 21 C.M.A. 376, 45 C.M.R. 150 (1972).
- <sup>5</sup> United States v. Huff, 11 C.M.A. 397, 29 C.M.R. 213 (1960).
- <sup>6</sup> United States v. Parker, 19 C.M.R. 201 (A.C.M.R. 1955).
- <sup>7</sup> United States v. Walker, 21 C.M.A. 376, 378, 45 C.M.R. 150, 152 (1972).
- <sup>8</sup> *Id.*
- <sup>9</sup> United States v. Schroder, 47 C.M.R. 430 (A.C.M.R. 1973).
- <sup>10</sup> United States v. Gaillard, 49 C.M.R. 471 (A.C.M.R. 1974).
- <sup>11</sup> *Id.* at 476.
- <sup>12</sup> United States v. Parker, 19 C.M.R. 201 (A.C.M.R. 1955).
- <sup>13</sup> United States v. Allen, 8 C.M.A. 504, 25 C.M.R. 8 (1957).
- <sup>14</sup> United States v. Kloepfer, 49 C.M.R. 68 (A.C.M.R. 1974).
- <sup>15</sup> United States v. Burwell, 50 C.M.R. 192 (A.C.M.R. 1975).
- <sup>16</sup> United States v. Rowe, 18 C.M.A. 54, 39 C.M.R. 54 (1968).
- <sup>17</sup> United States v. Richardson, 18 C.M.A. 52, 39 C.M.R. 52 (1968).
- <sup>18</sup> United States v. Blunk, 17 C.M.A. 158, 37 C.M.R. 422 (1967).
- <sup>19</sup> United States v. Palenius, 25 C.M.A. 222, 54 C.M.R. 549 (1977).
- <sup>20</sup> *Id.* at 230, 231, 54 C.M.R. at 557, 558.
- <sup>21</sup> *ABA Standards for Criminal Justice, The Defense Function*, Approved 1971, 51.1 (b).

## Judiciary Notes

*U.S. Army Judiciary**Administrative Notes*

1. For the month of August the following errors in the initial promulgating orders were corrected by the Army Court of Military Review:

a. Failure to properly set forth the pleas of the accused—2 cases.

b. Failure to set forth the proper wording in the specification of a charge; failure to indicate that trial was by military judge alone—one case each.

2. When an accused indicates that he wishes to be represented by civilian counsel on appeal, the name and address of such counsel should be forwarded by the trial defense counsel to the Office of the Clerk of Court as soon as possible.

3. Requests for final action should no longer be sent directly to the accused. Commands should advise an accused that he may execute a request for final action after he has consulted with legally qualified counsel at the nearest

Army installation having an SJA office. See page 10, December 1976 issue of *The Army Lawyer* for format and instructions.

4. In accordance with Rules 35 and 36a(3), *United States Court of Military Appeals Rules of Practice and Procedure*, an original and four legible copies of all petitions for grant of review should be sent to the Court of Military Appeals. Carbon copies are not acceptable.

*MOBDES Vacancies*

Several MOBDES vacancies are expected to occur before May 1978 in the Appellate and Trial Judiciary Divisions of the US Army Judiciary. Reserve personnel who are interested and who believe they may qualify as MOBDES judges may apply for assignment by submitting three copies of completed DA Form 2976 (Application for Mobilization Designation Assignment) to their immediate commander. Instructions and procedures are found in para 3-6, AR 140-145, dated 24 June 1977.

**QUARTERLY COURT-MARTIAL  
RATES PER 1,000 AVERAGE STRENGTH  
APRIL—JUNE 1977**

	General	Special		Summary
	CM	BCD	CM	CM
			NON-BCD	
ARMY-WIDE	.53	.28	1.25	.64
CONUS Army commands	.27	.35	1.25	.72
OVERSEAS	.49	.18	1.26	.49
Army commands				
USAREUR and Seventh				
Army Commands	.62	.16	1.43	.48
Eighth US Army	.08	.11	1.09	.22
US Army Japan	—	—	—	.05
Units in Hawaii	—	.27	.27	.27
Units in Thailand	—	—	—	—
Units in Alaska	.51	.82	1.02	.72
Units in Panama				
Canal Zone	.26	—	.78	2.35

NOTE: Above figures represent geographical areas under the jurisdiction of the commands and are based on average number of personnel on duty within those areas.

**NON-JUDICIAL PUNISHMENT  
QUARTERLY COURT-MARTIAL  
RATES PER 1,000 AVERAGE STRENGTH  
APRIL—JUNE 1977**

	Quarterly Rates
ARMY-WIDE	54.84
CONUS Army commands	60.19
OVERSEAS Army commands	45.63
USAREUR and Seventh Army commands	43.30
Eighth US Army	62.65
US Army Japan	8.33
Units in Hawaii	50.64
Units in Thailand	—
Units in Alaska	39.96
Units in Panama/Canal Zone	51.02

NOTE: Above figures represent geographical areas under the jurisdiction of the commands and are based on average number of personnel on duty within those areas.

## Administrative and Civil Law Section

*Administrative and Civil Law Division, TJAGSA*

### *The Judge Advocate General's Opinions*

1. (Nonappropriated Fund Instrumentalities, Operational Principles) **Nonappropriated Fund Activities Selling Goods Or Services Are To Be Self-Sustaining With Respect To Expenses For Civilian Employees.** DAJA-AL 1977/4067, 23 Mar. 1977. The Judge Advocate General was asked if appropriated funds could be used to pay a contractor to reconstruct "the hard copy documentation and computer master files" for approximately 30,000 current and former nonappropriated fund employees having money deposited with the nonappropriated fund Group Insurance and Retirement Plan (GIRP). The Judge Advocate General noted that GIRP is a common service NAFFI, its purpose being to promote and maintain the morale and welfare of nonappropriated fund civilian employees, and that it exists as a personnel program for employees of all classes of NAFFI's. It was further noted that paragraph III.F., DoD Dir. 1330.2, requires nonappropriated fund activities selling goods or services (except

those required by law to sell at cost) to be self-sustaining with respect to expenses for civilian employees. It was The Judge Advocate General's opinion that the expenses associated with the administration of GIRP exist for and because of civilian employees and, therefore, could not be paid from appropriated funds.

2. (Information and Records, Release and Access) **Results Of Court-Martial May Be Furnished To State Licensing Agency.** DAJA-AL 1977/4332, 21 Apr. 1977. In response to an inquiry, The Judge Advocate General expressed the opinion that the general court-martial conviction of a Veterinary Corps officer may be reported to an appropriate state licensing agency or professional association charged with regulating his professional conduct. It is not an unwarranted invasion of privacy under the Freedom of Information Act to disclose the results of a public criminal proceeding; therefore, the Privacy Act permits its disclosure. An agency may make such a disclosure on its own initiative. There is no requirement to delay dis-

closure until completion of appellate review; however, recipients of the information should be notified that appellate review is pending.

**3. (Nonappropriated Fund Instrumentalities, Private Organizations) Fund-Raising Activities By Private Associations Conducted On Club Premises Will Not Occur At The Same Time The Club Provides The Same Activity Nor Will Such Activities Compete With Club Functions.** DAJA-AL 1977/4238, 11 May 1977. Para. 6-5f, AR 230-60, authorizes the use of Army club system facilities for the conduct of fund raising activities by private associations:

... provided the ICM and the branch manager maintain control over the conduct of the activities. All costs incurred by the club activity as a result of the event will be reimbursed by the private association. Charges assessed by the club will include a service charge sufficient to meet operational objectives. Fund-raising activities will not occur at the same time the club provides the same activity, nor will such activities compete with club functions.

In view of this paragraph, The Judge Advocate General was asked if clubs could authorize wives' clubs to play one game of bingo before, during, or after the scheduled club bingo as a fund raising activity. It was his opinion that such fund-raising activities could be authorized by the local commander, subject to the conditions described in subpara. 7b and c, AR 600-29, so long as the activity does not "occur at the same time the club provides the same activity" nor "compete with club functions." These are questions of fact which must be determined on the circumstances of the particular case. For example, if it was determined that the wives' club bingo game interfered with a scheduled club bingo game or that authorized patrons of the club, who were also members of the wives' club, participated in the wives' club bingo game *in lieu of* participating in the scheduled club bingo game, then there would be a regulatory violation.

**4. (Information and Records, Release and Access) Medical Information May Be Furnished**

**To State Department Of Motor Vehicles.** DAJA-AL 1977/4514, 11 May 1977. Military doctors diagnosed that a soldier suffered from a medical condition which caused blackouts, making it prohibitively dangerous for him to operate a motor vehicle. This information could not be released to the state department of motor vehicles as a routine use under the applicable system notice required by the Privacy Act (5 U.S.C. § 552(a)), because the state in question did not require the reporting of such information. The question arose whether this medical information could otherwise be released to state authorities on agency initiative.

Release of this information would be required under the Freedom of Information Act unless it constituted a clearly unwarranted invasion of personal privacy under Exemption 6 (5 U.S.C. § 552(b)(6)). In this instance, The Judge Advocate General expressed the opinion that release was not a clearly unwarranted invasion of personal privacy because the public interest in prohibiting medically unfit motor vehicle operators outweighs an individual's privacy interest in this medical information.

**5. (Retired Members, Retirement Pay) Acceptance Of Honorary Foreign State Office May Cause Loss Of Retired Pay.** DAJA-AL 1977/4367, 13 May 1977. A retired Regular Army officer inquired whether acceptance of appointment as honorary consul of a foreign government without compensation was prohibited. The U.S. Constitution prohibits persons holding any office of profit or trust in the federal government from accepting, without the consent of Congress, any emolument, office or title, from a foreign state. The Assistant Judge Advocate General for Military Law responded that the prohibition applies to all persons holding positions of trust or profit in the federal government, including retired Regular Army officers. The prohibition precludes acceptance of any office or title "of any kind whatever" from a foreign state. Without congressional approval, acceptance of the honorary position would violate the constitutional prohibition and could result in the loss of retired pay for the duration of the violation.

6. (Military Installations, Law Enforcement) **Strip Search To Find Contraband Was Not A Wrong Under Article 138.** DAJA-AL 1977/4306, 23 May 1977. An enlisted member submitted a complaint under article 138, U.C.M.J., requesting letters of apology from his company commander and other members of the chain of command. He alleged that, following a complete search of his room which produced no contraband, an NCO ordered him to undress. The complainant refused to remove his underwear and the NCO called upon the authority of the company commander who was present with three other members of the command. Feeling intimidated, the complainant removed his underwear. The Division Commander denied relief under art. 138 and The Judge Advocate General found the resolution legally correct. There is no law or regulation which prescribes specific methods or guidelines on how commanders are to conduct a body search. The District of Columbia Circuit Court, in *Committee for GI Rights v. Calloway*, 171 U.S. App. D.C. 73 (1975), stated that "expectation of privacy" was different in the military than in civilian life and held that searches for drugs in the groin or anal areas were not violative of the fourth or fifth amendment to the U.S. Constitution. In the instant case, an informant had indicated the night before the search that the complainant was in possession of contraband and that the chain of command would not conduct body searches. Other methods of search may have been less embarrassing and humiliating to the complainant, but his commander was within the limits of his discretion in the conduct of the search. The Judge Advocate General stated that a patdown search by a CID agent may have been more appropriate but, under the circumstances, the method of search was not a wrong for which relief must be granted under art. 138.

7. (Contributions and Gifts) **Participation In The Combined Federal Campaign Does Not Preclude Off-The-Job Solicitation By Certain Voluntary Agencies.** DAJA-AL 1977/4330, 24 May 1977. A staff judge advocate asked whether participation in the Combined Federal Campaign precluded on-post solicitation by

other private charitable and humanitarian organizations during off-duty hours and, if not, how many solicitation periods were allowable. The rules concerning fund raising found in AR 600-29, 15 Oct. 76, are strictly interpreted because they implement the U.S. Civil Service Commission Manual on Fund Raising. Under AR 600-29, fund raising campaigns on military installations must be consolidated into a single annual drive (the Combined Federal Campaign conducted in the fall of the year) at locations where there are 200 or more federal personnel. Other rules apply where there are fewer than 200 federal employees in the local campaign area. The Judge Advocate General stated that the essence of participation in these campaigns is that each military member and civilian employee will be given the opportunity, through on-the-job solicitations, to contribute voluntarily to recognized private charitable and humanitarian organizations. The Judge Advocate General concluded that such participation does not preclude off-the-job solicitation by other voluntary agencies, but that such solicitation may not be conducted as an official, command-sponsored fund raising project and is subject to the discretion of the local installation commander. The local commander should give consideration to the discussion at paras. 1.2, 3.52-53 and 4.1 of the U.S. Civil Service Commission Manual on Fund Raising which provides rationale for limiting *on-the-job* solicitations in scope and frequency.

#### *Federal Labor Relations Decision*

(Federal Labor Relations, Unfair Labor Practices) **Council Upholds Arbitrator's Decision That Time Detained For Gate Search Is Compensable.** U.S. Marine Corps Supply Center, Albany, GA, FLRC No. 75A-98 (8 Mar. 1977). A report of missing government property led to a gate search of vehicles during the installation's close of work rush hour. Union representatives acknowledged the right of the activity management to order necessary searches, but contended that affected employees were entitled under the collective bargaining agreement to overtime pay for their deten-

tion on government property for the benefit of their employer.

In awarding overtime to each employee whose departure was delayed more than six minutes, the arbitrator appeared to rely in part

on his factual determination that there had been an unreasonable delay by installation officials in implementing the search. On appeal, the Federal Labor Relations Council applied regulatory interpretations by the Civil Service Commission to sustain the award.

## Legal Assistance Items

*Major F. John Wagner, Jr. and Captain Steven F. Lancaster,  
Administrative and Civil Law Division, TJAGSA*

### 1. ITEMS OF INTEREST

**Commercial Affairs—Civilian Indebtedness—Bankruptcy; Family Law—Domestic Relations—Alimony, Child Support, Custody and Property Settlements.** A United States Federal District Court has recently ruled that § 17a(7) of the Bankruptcy Act [11 U.S.C. § 35a(7)] is unconstitutional. The section of the Bankruptcy Act in question provides that “[a] discharge in bankruptcy shall release a bankrupt from all his provable debts, whether allowable in full or in part except such as . . . (7) are for alimony due or to become due, or for the maintenance or support of wife. . . .” In the instant case the defendant filed a bankruptcy petition and was adjudicated a bankrupt by the court. The defendant conceded that the award for child support is a nondischargeable debt under the section in question, but challenged the constitutionality as to the question of dischargeability of an alimony award of \$5,900. The issue was drawn as to whether the section in question created an invalid gender-based distinction in violation of the due process clause of the fifth amendment, because it denies a male-husband a discharge of his obligations for alimony or maintenance or support of a female-wife, although under the same provision of the Bankruptcy Act, the wife is not denied the same benefits of discharge of indebtedness for alimony or spousal support. Section 17a(7) provides that different treatment be accorded to individuals on the basis of their sex. Thusly, it establishes a classification subject to scrutiny under the equal protection clause of the United States Constitution. See *Stanton v. Stanton*, 421 U.S. 7, 13 (1975); *Frontiero v. Richardson*,

411 U.S. 677, 682-83 (1973); *Reed v. Reed*, 404 U.S. 71, 75 (1971). When the court looked behind § 17a(7) of the Bankruptcy Act to the legislative history it discovered that when that particular section was enacted in 1970 the intent was to exempt wives and children from the Bankruptcy Act operating to deprive them of receiving support from husbands and fathers. The underlying assumption here used to be the same as that which was the basis of § 402(g) of the Social Security Act and the Federal Armed Services Benefits statutes. These statutes were held unconstitutional because they were based on overbroad generalizations concerning the duty of the husband to support his wife. The “overbroad generalization” is that female-wives and children will not be supported if alimony and support payments by the male-husband are not continued. Without providing the opportunity for a hearing to determine the respective abilities and needs of the parties, there is an arbitrary legislative decision that the debt of the male is not dischargeable, while the debt of the female is discharged. According to the court, the only basis for the distinction is the sex of the individual. The court, in referring to *Stanton v. Stanton*, stated that this distinction was the kind of invidious discrimination, without regard to the actual capabilities of individuals, that the Supreme Court was attempting to prevent in holding that sex-based classifications are inherently suspect and subject to strict judicial scrutiny. The court held that the classification in question does not have a fair and substantial relation to the objective of the legislative scheme, does not meet the established standards of judicial scrutiny, and is un-

constitutional. The court did address the issue that the discrimination complained of appears to favor the historically disadvantaged class. However, the court went past that by stating that discrimination based on suspect classification is invidious no matter which class has the advantage of the discrimination. See *McDonald v. Sante Fe Trail Trans. Co.*, 427 U.S. 273 (1976). Accordingly, said the court, the frequency with which the issue of dischargeability of alimony-type debts might arise involving male debtors as compared to female debtors cannot be a factor in the court's consideration of the merits of the instant case. *In re Wasserman*, \_\_\_ F. Supp. \_\_\_ (D.R.I. 1977), 46 U.S.L.W. 2073. [Reference: Chapters 9 and 20, DA PAM 27-12.]

**Commercial Affairs—Commercial Practices And Controls—Federal Statutory And Regulatory Consumer Protection—Door-To-Door Sales.** The Federal Trade Commission is pursuing an investigation concerning compliance with the "cooling off period" rule in its door-to-door sales regulation. The rule requires that in sales which qualify as door-to-door sales, the seller afford the consumer a three-day cooling off period. During that three-day cooling off period the buyer may elect to cancel the sale and suffer no penalty.

**Commercial Affairs—Commercial Practices and Controls—Federal Statutory And Regulatory Consumer Protections—Preservation Of Consumer Claims And Defenses.** On 14 April 1977, the Federal Trade Commission exempted certain contracts from its Trade Regulation Rule concerning the preservation of consumers' claims and defenses. The exemption applied to two-party open-end consumer credit contracts entered into before 1 August 1977, which did not involve the use of negotiable instruments or waivers of claims and defenses. The Federal Trade Commission recently voted to extend the exemption for a period of 45 days beyond 1 August; thus, as of 15 September

1977 the Trade Regulation Rule concerning the preservation of consumers' claims and defenses will apply to all sellers taking or receiving consumer credit contracts.

**Commercial Affairs—Commercial Practices And Controls—Federal Statutory And Regulatory Consumer Protections—Truth In Warranties Act.** The Federal Trade Commission has proposed a rule under the Magnuson-Moss Warranty Act which would relieve the consumer of eight conditions in order to take advantage of a full warranty. Under the proposed rule, it would be unreasonable for a warrantor offering a full warranty to require that: a consumer assume the costs of mailing a product to or from a warranty service point; a consumer return to a warranty service point a product weighing over 35 pounds; a consumer complete and return a registration card shortly after purchase to make the warranty effective; and a consumer return a built-in product for service unless the product can be removed without special tools or skills. Public hearings on the proposed rule will be held in Chicago, Los Angeles, and Washington, D.C., on 3 October, 7 November, and 6 December respectively. [Reference Chapter 10, DA PAM 27-12.]

## 2. ARTICLES AND PUBLICATIONS OF INTEREST.

### TAXATION—FEDERAL ESTATE TAX AND GIFT TAX—TAX REFORM ACT OF 1976.

Borod, Lawson, and Smith, *Marital Deduction Planning Under the Tax Reform Act of 1976*, 7 MEMPHIS ST. U.L. REV. 181 (1977).

Castleman, *Lifetime Gifts in Estate Planning Under the 1976 Tax Reform Act*, 26 DRAKE L. REV. 313 (1977).

Donaldson, *Inter Vivos Giving in Estate Planning Under the Tax Reform Act of 1976*, 18 W. & M.L. REV. 539 (1977).

[Ref: Ch. 13 and 42, DA PAM 27-12.]

## CLE News

**1. Wisconsin Approves TJAGSA Courses for CLE Credit.** The Wisconsin Board of Continu-

ing Legal Education has approved the award of specific credit allotments for TJAGSA courses

offered through December 1977, based on the program of instruction for each course. The Wisconsin Board has declined to award CLE credit for Course 5-F51, Management for Military Lawyers. The Director of the Wisconsin Board indicated that to date the Wisconsin Board has routinely denied credit for all management courses.

Information concerning the amount of credit for specific courses may be obtained from Lieutenant Colonel Fred K. Green, Deputy Director, Academic Department, TJAGSA, commercial (804) 293-2028, autovon 274-7110, extension 293-2028.

**2. TJAGSA Annual Bulletin Distributed.** The 1977-1978 edition of the Annual Bulletin of The Judge Advocate General's School has been published and distributed. The publication contains information about the School and its academic programs. The Bulletin consolidates in one volume the resident course listings and schedule and the correspondence course catalog. The Bulletin will be published at the beginning of each academic year. Any changes during the year will appear in *The Army Lawyer*.

The following corrections should be noted in the Bulletin. The Purpose clause of the Criminal Trial Advocacy Course (5F-F32) should read, "To improve and polish the experienced trial attorney's advocacy skills," thus deleting the word "defense." The Purpose statements for the International Law I and II Courses (5F-F40 and 5F-F41) refer to Phase II of the USAR Advanced Course. This should have been Phase VI. The 5th Fiscal Law Course, shown in the calendar as running from 28-31 November, goes through 1 December. The 39th Senior Officer Legal Orientation Course has been moved from mid-February to 7-10 March.

### 3. TJAGSA CLE Courses.

November 14-18: 36th Senior Officer Legal Orientation Course (5F-F1).

November 28-December 1: 5th Fiscal Law Course (5F-F12).

December 5-8: 4th Military Administrative Law Developments Course (5F-F25).

December 12-15: 5th Military Administrative Law Developments Course (5F-F25).

January 3-6: 2d Claims Course (5F-F26).

January 9-13: 8th Procurement Attorneys' Advanced Course (5F-F11).

January 9-13: 6th Law of War Instructor Course (5F-F42).

January 16-18: 4th Allowability of Contract Costs Course (5F-F13).

January 16-19: 1st Litigation Course (5F-F29).

January 23-27: 37th Senior Officer Legal Orientation Course

February 6-9: 6th Fiscal Law Course (5F-F12).

February 6-10: 38th Senior Officer Legal Orientation Course (5F-F1).

February 13-17: 4th Criminal Trial Advocacy Course (5F-F32).

February 27-March 10: 74th Procurement Attorneys' Course (5F-F10).

March 7-10: 39th Senior Officer Legal Orientation Course (5F-F1).

March 13-17: 7th Law of War Instructor Course (5F-F42).

April 3-7: 17th Federal Labor Relations Course (5F-F22).

April 3-7: 4th Defense Trial Advocacy Course (5F-F34).

April 10-14: 40th Senior Officer Legal Orientation Course (5F-F1).

April 17-21: 8th Staff Judge Advocate Orientation Course (5F-F52).

April 17-28: 1st International Law I Course (5F-F40).

April 24-28: 5th Management for Military Lawyers Course (5F-F51).

May 1-12: 7th Procurement Attorneys' Course (5F-F10).

May 8-11: 7th Environmental Law Course

(5F-F27).

May 15-17: 2d Negotiations Course (5F-F14).

May 15-19: 8th Law of War Instructor Course (5F-F42).

May 22-June 9: 17th Military Judge Course (5F-F33).

June 12-16: 41st Senior Officer Legal Orientation Course (5F-F1).

June 19-30: Noncommissioned Officers Advanced Course Phase II (71D50).

July 24-August 4: 76th Procurement Attorneys' Course (5F-F10).

August 7-11: 7th Law Office Management Course (7A-173A).

August 7-18: 2d Military Justice II Course (5F-F31).

August 21-25: 42d Senior Officer Legal Orientation Course (5F-F1).

August 28-31: 75th Fiscal Law Course (5F-F12).

September 18-29: 77th Procurement Attorneys' Course (5F-F10).

**4. TJAGSA CLE Courses.** Information on the prerequisites and content of other TJAGSA courses is printed in CLE News, *The Army Lawyer*, September 1977, at 35.

**LAW OFFICE MANAGEMENT COURSE  
(7A-713A)**

*Length:* 4-1/2 days.

*Purpose:* To provide a working knowledge of the administrative operation of a staff judge advocate office and principles involved in managing its resources.

*Prerequisites:* Active duty or Reserve Component warrant officer or senior enlisted personnel of an armed force serving in grade E-8/E9 and currently performing or under orders to an assignment which will require the performance of law office management duties. Personnel who have completed this course within the

two-year period immediately preceding the date of the course are not eligible to attend. Security clearance required: None.

*Substantive Content:* Office management; management of military and civilian personnel; criminal law administrative procedures, administrative law procedures, Army management system; office management of a law office, and fundamentals of management theory.

**5. Civilian Sponsored CLE Courses.**

**November**

2-4: Univ. of Baltimore School of Business—Federal Publications, Small Purchasing [Small Purchase Procurement], Sheraton Natl., Arlington, VA. Contact: Miss J. K. Van Wycks, Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone (202) 337-7000. Cost: \$425.

2-4: Federal Publications, Practical Labor Law, Seattle, WA. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone (202) 337-7000. Cost: \$425.

2-4: Loyola Univ. School of Law—Federal Publications, Competing for Contracts, Sheraton National, Arlington, VA. Contact: Miss J. K. Van Wycks, Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone (212) 337-7000. Cost: \$425.

3-4: PLI, Current Trends in Domestic and International Licensing, Biltmore Hotel, New York, NY. Contact: Nancy B. Hinman, Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone (212) 765-5700. Cost: \$200.

3-4: PLI, Practical Will Drafting, Stanford Court Hotel, San Francisco, CA. Contact: Nancy B. Hinman, Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone (212) 765-5700. Cost: \$175.

3-4: PLI, Remedies for Breach of Contract, Continental Plaza Hotel, Chicago, IL. Contact: Nancy B. Hinman, Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone (212) 765-5700. Cost: \$175.

3-5: PLI, Advanced Criminal Trial Tactics for Prosecution and Defense, Marquette Inn, Minneapolis, MN. Contact: Nancy B. Hinman, Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone (212) 765-5700. Cost: \$200.

6-11: NCSJ, Evidence (Graduate), Judicial College Bldg., Univ. of Nevada, Reno NV. Contact: Judge Ernst John Watts, Dean, National College of the State Judiciary, Judicial College Bldg., Univ. of Nevada, Reno, NV. 89557. Phone (702) 784-6747. Cost: \$350.

6-11: NCSJ, Sentencing Misdemeanants (Specialty), Judicial College Bldg., Univ. of Nevada, Reno, NV. Con-

tact: Judge Ernst John Watts, Dean, National College of the State Judiciary, Judicial College Bldg., Univ. of Nevada, Reno, NV 89557. Phone (702) 784-6747. Cost: \$350.

7-8: PLI, Foreign Trusts and Foreign Estates: Planning for United States and Foreign Persons, The Beverly Hilton Hotel, Los Angeles, CA. Contact: Nancy B. Hinman, Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone (212) 765-5700. Cost: \$185.

7-9: Federal Publications, Government Contract Costs, San Diego, CA. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone (202) 337-7000. Cost: \$425.

7-9: Federal Publications, Government Architect-Engineer Contracting, Sea Island, GA. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone (202) 337-7000. Cost: \$425.

8-10: LEI, Paralegal Workshop, Washington, DC. Contact: Legal Education Institute—TOG, U.S. Civil Service Commission, 1900 E St. NW, Washington, DC 20415. Phone (202) 254-3483.

9-10: ABA National Institute, Current Legal Aspects of Doing Business in European Common Market Countries (Section of International Law). Contact: American Bar Association National Institutes, American Bar Association, 1155 E. 60th St., Chicago, IL 60637. Phone (312) 947-3950.

9-11: Federal Publications—George Washington Univ. National Law Center, Federal Procurement Law—An Authors Conference, George Washington Univ. Library, 2130 H St. NW, Washington, DC. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone (202) 337-7000.

9-11: Federal Publications, Negotiated Procurement, Washington, DC. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone (202) 337-7000. Cost: \$425.

10-11: PLI, Current Trends in Domestic and International Licensing, Stanford Court Hotel, San Francisco, CA. Contact: Nancy B. Hinman, Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone (212) 765-5700. Cost: \$200.

10-11: PLI, Communications Law 1977, Barbizon Plaza Hotel, New York, NY. Contact: Nancy B. Hinman, Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone (212) 765-5700. Cost: \$175.

10-11: PLI, Equipment Leasing 1977, New Developments, Stanford Court Hotel, San Francisco, CA. Contact: Nancy B. Hinman, Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone (212) 765-5700. Cost: \$200.

13-16: NCDA, Law Office Management, San Francisco, CA. Contact: Registrar, National College of District At-

torneys, College of Law, Univ. of Houston, Houston, TX 77004. Phone (713) 749-1571.

13-18: NCSJ, The Decision-Making Process (for general jurisdiction judges), Judicial College Bldg., Univ. of Nevada, Reno, NV. Contact: Judge Ernst John Watts, Dean, National College of the State Judiciary, Judicial College Bldg., Univ. of Nevada, Reno, NV 89557. Phone (702) 784-6747. Cost: \$350.

13-18: NCSJ, Administrative Law Procedure (for administrative law judges), Judicial College Bldg., Univ. of Nevada, Reno, NV. Contact: Judge Ernst John Watts, Dean, National College of the State Judiciary, Judicial College Bldg., Univ. of Nevada, Reno, NV 89557. Phone (702) 784-6747. Cost: \$350.

14-15: Negotiation Institute, The Art of Negotiating, Hyatt Regency, Washington, DC. Contact: Negotiation Institute, Inc., 230 Park Ave., New York, NY 10017. Phone (212) 986-5558. Cost: \$450.

14-16: George Washington Univ.—Federal Publications, Cost Accounting Standards, Washington, DC. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone (202) 337-7000. Cost: \$450.

14-16: Federal Publications, Practical Negotiation of Government Contracts, Los Angeles, CA. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone (202) 337-7000. Cost: \$425.

14-16: NYU School of Continuing Education, Managerial Skills for the Developing Manager, Los Angeles, CA. Contact: SCENYU Registrations, New York Conference Management Center, 360 Lexington Ave., New York, NY 10017. Phone 800-223-7450. Cost: \$495 for the first person and \$435 for each additional person.

14-18: George Washington Univ. National Law Center, Cost Reimbursement Contracting, George Washington Univ. Library, 2130 H St. NW, Washington, DC. Contact: Government Contracts Program, George Washington Univ., 2000 H St. NW, Washington, DC 20052. Phone (202) 676-6815. Cost: \$475.

15-16: Institute for Paralegal Training Workshop for Managers of Paralegal Programs, Philadelphia, PA. Contact: the Institute for Paralegal Training, 235 S 17th St., Philadelphia, PA 19103. Cost: \$250.

16-17: LEI, Application of the Administrative Procedure Act to Regulatory Proceedings Seminar, Washington, DC. Contact: Legal Education Institute—TOG, U.S. Civil Service Commission, 1900 E St. NW, Washington, DC 20415. Phone (202) 254-3483.

16-19: NCDA, Trial of a Drug Case, El Paso, TX. Contact: Registrar, National College of District Attorneys, College of Law, Univ. of Houston, Houston, TX 77004. Phone (713) 749-1571.

17-18: PLI, Industrial Development and Pollution Control Financing, Association of the Bar of the City of New York, New York, NY. Contact: Nancy B. Hinman, Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone (212) 765-5700. Cost: \$200.

17-18: PLI, 8th Annual Estate Planning Institute, Continental Plaza Hotel, Chicago, IL. Contact: Nancy B. Hinman, Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone (212) 765-5700. Cost: \$185.

17-18: PLI, Basic Labor Relations, Marc Plaza Hotel, Milwaukee, WI. Contact: Nancy B. Hinman, Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone (212) 765-5700. Cost: \$175.

17-19: PLI, Advanced Criminal Trial Tactics for Prosecution and Defense, Del Webb's Town House, Phoenix, AZ. Contact: Nancy B. Hinman, Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone (212) 765-5700. Cost: \$200.

18-19: PLI, Hospital Liability: Current Problems, Los Angeles Hilton Hotel, Los Angeles, CA. Contact: Nancy B. Hinman, Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone (212) 765-5700. Cost: \$175.

21-23: Federal Publications, Cost Estimating for Government Contracts, San Francisco, CA. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone (202) 337-7000. Cost: \$425.

28-30: Federal Publication, Procurement for Lawyers, Williamsburg, VA. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone (202) 337-7000. Cost: \$425.

28-30: Federal Publications, Practical Labor Law, Washington, DC. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone (202) 337-7000. Cost: \$425.

28-30: Loyola Univ. School of Law—Federal Publications, Competing for Contracts, Airport Park Hotel, Los Angeles, CA. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone (202) 337-7000. Cost: \$425.

28-30: Federal Publications—George Washington Univ. National Law Center, Cost Accounting Standards, George Washington Univ. Library, 2130 H St. NW, Washington, DC. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone (202) 337-7000.

28-9 Dec.: LEI, Procurement Law Course, Washington, DC. Contact: Legal Education Institute—TOG, U.S. Civil Service Commission, 1900 E St. NW, Washington, DC 20415. Phone (202) 254-3483.

30-2 Dec.: Federal Publications, Government Contract Costs, Williamsburg, VA. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone (202) 337-7000. Cost: \$425.

1-2: PLI, Remedies for Breach of Contract, Los Angeles Hilton Hotel, Los Angeles, CA. Contact: Nancy B. Hinman, Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone (212) 765-5700. Cost: \$175.

1-2: PLI, Practical Will Drafting, Barbizon Plaza Hotel, New York, NY. Contact: Nancy B. Hinman, Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone (212) 765-5700. Cost: \$175.

1-3: National Council of Juvenile Court Judges, The Unmet Challenge of the '70's—Juvenile Justice for Young Women, Hilton Gateway Inn, Kissimmee (Orlando), FL. Contact: Project Director, National Council of Juvenile Court Judges, Department MM, Univ. of Nevada, P.O. Box 8978, Reno, NV 89507. Phone (702) 784-6012.

4-9: NCDA, Advanced Organized Crime, Columbus, OH. Contact: Registrar, National College of District Attorneys, College of Law, Univ. of Houston, Houston, TX 77004. Phone (713) 749-1571.

4-9: NCSJ, Court Administration-Specialty, Judicial College Bldg., Univ. of Nevada, Reno NV. Contact: Judge Ernst John Watts, Dean, National College of the State Judiciary, Judicial College Bldg., Univ. of Nevada, Reno, NV 89557. Phone (702) 784-6747. Cost: \$350.

4-16: NCSJ, The Judge and the Trial (Graduate), Judicial College Bldg., Univ. of Nevada, Reno, NV. Contact: Judge Ernst John Watts, Dean National College of the State Judiciary, Judicial College Bldg., Univ. of Nevada, Reno, NV 89557. Phone (702) 784-6747. Cost: \$540.

5-6: PLI, Foreign Trusts and Foreign Estates: Planning for United States and Foreign Persons, Barbizon Plaza Hotel, New York, NY. Contact: Nancy B. Hinman, Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone (212) 765-5700. Cost: \$185.

5-7: George Washington Univ. National Law Center—Federal Publications, The Practice of Equal Employment, Miami, FL. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone (202) 337-7000. Cost: \$425.

5-7: Federal Publications, Practical Negotiation of Government Contracts, Williamsburg, VA. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone (202) 337-7000. Cost: \$425.

7-9: Federal Publications, Changes in Government Contracts, Washington, DC. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone (202) 337-7000. Cost: \$425.

9-10: ALI-ABA, Practice under the Federal Rules of Evidence: Recent Developments, San Diego, CA. Contact: Donald M. Maclay, Director, Courses of Study, ALI-ABA Committee on Continuing Professional Educa-

tion, 4025 Chestnut St., Philadelphia, PA 19104. Phone (215) 387-3000.

11-16: NCSJ, Alcohol and Drugs-Specialty, Judicial College Bldg., Univ. of Nevada, Reno, NV 89557. Contact: Judge Ernst John Watts, Dean, National College of the State Judiciary, Judicial College Bldg. Phone (702) 784-6747. Cost: \$350.

12-13: Negotiation Institute, The Art of Negotiating, Hyatt Regency O'Hara, Chicago, IL. Contact: Negotiation Institute, Inc., 230 Park Ave., New York, NY 10017. Phone (212) 986-5558. Cost: \$450.

12-14: George Washington Univ. National Law Center—Federal Publications, Living with OSHA, Miami, FL. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone (202) 337-7000.

12-14: George Washington Univ. National Law Center, Patents and Technical Data [procurement aspects of patents and technical data in government contracting], Century Plaza Hotel, Los Angeles, CA. Contact: Government Contracts Program, George Washington Univ., 2000 H St. NW, Washington, DC 20052. Phone (202) 676-6815. Cost: \$400.

12-14: Federal Publications, Cost Estimating for Government Contracts, Washington, DC. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone (202) 337-8200. Cost: \$425.

12-16: Federal Publications, The Masters Institute in Government Contracting, San Francisco, CA. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone (202) 337-7000. Cost: \$600.

13-15: LEI, Environmental Law Seminar, Berkeley, CA. Contact: Legal Education Institute—TOG, U.S. Civil Service Commission, 1900 E St. NW, Washington, DC 20415. Phone (202) 254-3483.

14-16: Federal Publications, Contracting for Services, Washington, DC. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone (202) 337-7000. Cost: \$425.

15-17: PLI, Advanced Criminal Trial Tactics for Prosecution and Defense, New York Hilton Hotel, New York, NY. Contact: Nancy B. Hinman, Practising Law Institute, 810 7th Ave., New York, NY 10019. Phone (212) 765-5700. Cost: \$200.

19-21: Federal Publications, Renegotiation of Government Contracts, Washington, DC. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone (202) 337-7000. Cost: \$475.

19-21: Federal Publications, Changes in Government Contracts, San Diego, CA. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone (202) 337-7000. Cost: \$425.

19-21: George Washington Univ. National Law Center—Federal Publications, Equal Employment Claims & Litigation, Las Vegas, NV. Contact: Seminar Division, Federal Publications Inc., 1725 K St. NW, Washington, DC 20006. Phone (202) 337-7000.

19-21: NYU School of Continuing Education, Government Project Management, Chicago, IL. Contact: SCENYU Registrations, New York Conference Management Center, 360 Lexington Ave., New York, NY 10017. Cost: \$355 for the first person and \$295 for each additional person.

## EPMS—Its Impact Upon the Judge Advocate General's Corps' Enlisted Legal Clerks and Court Reporters

*Captain John F. DePue, JAG Liaison, MILPERCEN*

During the last four years, in conjunction with Headquarters, TRADOC, the U.S. Army Military Personnel Center, has engaged in a comprehensive effort to mold existing programs of training evaluation, classification and promotion of enlisted personnel into an integrated system. The product of this task, termed the Enlisted Personnel Management System, or EPMS, has been the subject of a substantial amount of commentary in various Army publications including the professional journals of several branches. As EPMS will be implemented for the Judge Advocate General's Corps' enlisted legal clerks (MOS 71D) and

court reporters (MOS 71E) this September, it is appropriate to present a discussion of the system's implications for both these soldiers and their officer-supervisors.

EPMS combines several objectives. Each affects the individual soldier's ability to enhance his professional competence and advance within his career field. First, EPMS is designed to bring the Army's total authorized enlisted grade structure into line with budgetary limitations imposed by Congress and the Department of Defense. In this regard, at the inception of the program, the Army's documented

requirements called for an enlisted force in grades E-4 through E-9 that was 10% higher and involved some 60,000 more positions at these grades than Congress had provided in the budget. Thus, it was necessary to evaluate the grade requirements within each MOS and downgrade some positions. Concurrently, some MOS grade structures were realigned to eliminate promotion "bottlenecks." This measure is intended to ensure that a genuine opportunity for career progression exists within each MOS or career field. Finally, the formulators of EPMS established a correlation between the MOS skill level identifier, grade, promotability, and demonstrated competence. Under EPMS each skill level will correspond to an enlisted grade. In addition, a soldier's eligibility for promotion will depend, in part, on attaining the skill level corresponding to the next higher grade. Two methods will exist to permit a soldier to attain this higher skill level. One method will be a combination of On-the-Job Experience [OJE] plus a qualification score on the Skill Qualification Test [SQT] in the PMOS. The other method will be through attendance at an appropriate NCO Education System (NCOES) course plus a qualification score on the SQT in the PMOS. This discussion will consider the manner in which EPMS will affect the grade authorizations and the grade-skill level correlation for MOS 71D and MOS 71E.

Prior to EPMS, promotion from grade E-6 to E-7 within MOS 71D (Legal Clerk) was difficult as 1022 positions were authorized at the E-6 level while only 115 existed at grade E-7. As a consequence, 9 soldiers were required to compete for 1 E-7 position, and it was necessary to reclassify many soldiers into another MOS upon promotion to grade E-7. In addition, only 228 E-5 positions were authorized to feed these 1022 E-6 positions.

A perceived cause of this distortion in the MOS grade structure was the overgrading of the battalion legal clerk position. Accordingly, under EPMS the battalion legal clerk position will be downgraded from an E-6 position to an E-5 position, reducing the total number of 71D E-6 authorizations to 197 positions. This measure ultimately will permit greater promotion

opportunity within the MOS as it will limit the number of E-6s competing for promotion. Additionally, it will advance the broader objective of making Army-wide grade authorizations consistent with budgetary limitations.

Prior to EPMS, no legal clerk positions in grades E-3 and E-4 were authorized although soldiers at these grade levels frequently served as legal clerks. The EPMS grade structure will authorize 63 E-3 positions and 314 E-4 positions. For the most part, these new positions will exist in organizations where such junior personnel can work under the close supervision of an experienced legal clerk. It is intended that managers will assign these legal clerks to authorized positions in these grades, and discourage, whenever possible, their utilization in positions where they will be without the contemplated supervision.

The EPMS grade and force authorizations for MOS 71D can be compared to both pre-EMPS authorizations, and the Army's actual operating strength by means of the following table.

#### MOS 71D

Grade	EPMS		Actual	Over/Short
	Pre-EMPS	Auth	Force*	EPMS AUTH
E9	22	22	13	- 9
E8	44	44	30	- 14
E7	115	107	139	+ 32
E6	1022	197	529	+ 332
E5	228	684	855	- 329
E4	—	314	295	- 19
E3	—	63	98	+ 35
E2/1	—	—	77	+ 77
TOTAL	1431	1431	1536	+ 105

\*The data concerning the actual strength of each grade is predicated upon Army-wide statistics as reported for month end April 1977.

It is apparent from these statistics that, initially, an overstrength will exist at the E-6 level due to the substantial reduction of positions at this level. As the EPMS grade structure represents a long-term goal, this overstrength should be eliminated by attrition although it is possible that some reclassification of excess personnel in this grade may be neces-

sary to achieve the EPMS target. In any event, pending the attainment of this grade objective, it will be necessary to assign many E-6 legal clerks to the newly-designated E-5 positions.

This table also shows that, under EPMS, approximately 3.5 71D E-5 positions will exist for every 71D E-6 position. This ratio is a result of placing the battalion legal clerk's authorized grade at the E-5 level. Due to the substantial number of these positions within the Army, such a ratio with respect to the next higher grade is unavoidable regardless of the grade designated for the battalion legal clerk. However, as discussed previously, the position's placement at grade E-5 ultimately will enhance the E-6s' promotion opportunity within the MOS. Furthermore, it will not constitute a substantial detriment to the E-5s' promotion opportunity to grade E-6 in the MOS, as the attrition rate at grade E-5 should reduce the field of competition. Finally, the residual competition as a result of the E-5 to E-6 ratio will work to the benefit of the Judge Advocate General's Corps as those promoted within the MOS to supervisory levels will be the most qualified E-5 legal clerks.

The EPMS grade formulation for MOS 71E (Court Reporter) is also designed to enhance career progression and professionalism within the MOS. As can be observed from the table below, the most significant grade modification is that the bulk of court reporter positions will be at grade E-5 (59 positions) rather than at grade E-6 (35 positions).

#### MOS 71E

Grade	Pre-EPMS	EPMS Auth	Actual Force*	Over/Short EPMS Auth
E9	2	2	0	- 2
E8	4	4	1	- 3
E7	11	9	8	- 1
E6	52	35	41	+ 6
E5	40	59	30	- 29
E4	—	—	14	+ 14
TOTAL	109	109	94	- 15

\*The data concerning actual strength for each grade is predicated upon Army-wide statistics reported for monthend April 1977 and does not include personnel recently reclassified into MOS 71E and not reported as possessing the MOS on the Enlisted Master File (EMF).

In addition, the EPMS structure for this MOS contemplates that the primary source for court reporter training will be legal clerks at the senior E-4 level. This "feeder" concept, when combined with the anticipated dissimulation of more rigorous criteria by message from headquarters, TRADOC, and the selection guidance for entry into the Naval Justice School Court Reporters' Course described in TJAG's letter, subject, Selection and Training of Military Court Reporters, 14 June 1977, will insure that only experienced and highly competent soldiers are accepted for schooling and ultimate classification as court reporters.

It is apparent from this brief survey that, while the EPMS grade and strength structure might cause some short-term discomfort, the realignment will ultimately benefit both the Judge Advocate General's Corps and the individual soldier. However, the new structure's success in attaining its goals is contingent upon an appreciation of its purpose and impact by both the Corps' enlisted soldiers and their supervisors. JAGC supervisors should endeavor to explain the objectives of EPMS to their enlisted subordinates, emphasizing that the grade restructure will not involve actual demotions; only the downgrading of positions which cannot be filled at their authorized grade level. In addition, supervisors should assure that, whenever possible, TOE or TDA positions are staffed by soldiers possessing the grade authorized under EPMS. This effort is particularly important where inexperienced soldiers are concerned. The new standards of grade authorization for MOS 71D will be published as change 8 to AR 611-201 (Enlisted Career Management Fields and Military Occupational Specialities), and will be distributed this fall. Finally, supervisory personnel should discourage enlisted soldiers at grade E-6 from seeking reclassification into MOS 71D through on-the-job training or other means. The excess of personnel in this grade under EPMS will preclude such reclassification by Department of the Army.

In addition to revising the authorized grade and strength structure for each MOS, the formulators of EPMS established a correlation be-

tween MOS skill level, grade, and demonstrated competence. In this regard, prior to EPMS only two skill levels were authorized for both MOS 71D and MOS 71E although those MOS spanned grades E-5 through E-9. Five skill levels will be authorized for these MOS's and, as indicated by the following chart, they will correspond to progressively higher grades and levels of competence. Concurrently, the grade of Specialist Seven will be eliminated throughout the Army as personnel in this grade are generally supervisors, and the skills required for grade E-7 will involve the supervision of other soldiers.

**EPMS Grade-Skill Level Correlation  
for MOS 71D, 71E**

Grade	Pre-EPMS Skill Level		EPMS Skill Level	
	Legal Clk/Court Reporter	Legal Clk/Court Reporter	Legal Clk/Court Reporter	Legal Clk/Court Reporter
E-9	71D50	71E50	71D50	71E50
E-8	71D50	71E50	71D50	71E50
E-7(SFC)	71D50	71E50	71D40	71E40
E-7(SP7)	71D20	71E20	Eliminated	
E-6	71D20	71E20	71D30	71E30
E-5	71D20	71E20	71D20	71E20
E-4 and below	Not authorized		71D10	Not auth.

These new skill levels will play a particularly important role under EPMS for, as indicated above, the key to promotion will be the attainment of a qualification score on the SQT which merits the award of the next higher skill level plus NCOES or OJE, as appropriate. Thus, the skill level will reflect actual competence and not simply constitute a meaningless addition on one's MOS. In addition, the SQT will not only fulfill the present MOS test's role of testing the ability to perform at one's skill level, but also will serve the new function of determining eligibility for promotion. It should be noted that the test's new designation is not merely cosmetic. The EPMS testing program contemplates that the thrust of the SQT will vary significantly from its predecessor as, rather than testing knowledge of facts, the SQT will examine

the soldier's actual ability to perform the critical tasks required of the MOS. In this regard the SQT will be comprehensive—encompassing not only the entire spectrum of critical tasks for the MOS at the present skill level, but also a percentage of the critical tasks for the next higher skill level as well. The job specifications for each skill level will be published in Change 8 to AR 611-201. As a result, the legal clerk, whose specialization within his field results in unfamiliarity with other duties set forth in this regulation, will be at a serious disadvantage. He may find himself ineligible for promotion, and a potential candidate for reclassification or administrative elimination. To help the soldier overcome any disadvantages and be a more qualified legal clerk or court reporter, a Soldier's Manual will be prepared and distributed to each soldier. This manual will explain in detail all data on critical tasks of the MOS that the soldier is expected to know. This manual becomes increasingly important as the soldier prepares for his SQT. To assist the soldier in using his/her Soldier's Manual, an SQT notice will be sent to inform the soldier which critical tasks will be tested. The soldier must relate those identified tasks from the notice to the Soldier's Manual for further study.

It is anticipated that the SQT for MOS 71D and MOS 71E initially will be administered for record during the fourth quarter of 1979 after a validation phase during 1978. However, it is not premature to prepare for the SQT. Most importantly, office managers must resist the temptation to encourage specialization; rather, they should assure that their enlisted clerks become experienced in all aspects of the MOS through periodic duty rotation. This effort will ultimately benefit both the individual soldier and the Corps as it will result in the professional development of legal clerks whose thorough knowledge of the MOS will permit their utilization in any capacity.

## JAGC Personnel Section

### PP&TO, OTJAG

**1. Assignment as a Military Judge.** A number of vacancies are anticipated for the Summer of 1978 in the Trial Judiciary. Vacancies to be filled include GCM judge positions and SPCM positions in CONUS and abroad.

### 2. Selections of Military Judges.

a. To be a military judge, a JAGC officer must have a broad background of military criminal law experience. The officer must have an impeccable moral character, an even temperament, good judgment, common sense, learning, sound reasoning ability, patience, integrity, courage, a nonabrasive personality and a high degree of maturity. The officer must be able to express herself or himself, orally and in writing, in a clear, concise manner. It is also important for the individual to have an understanding of, and experience in, the principles and problems of leadership and exhibit a neat and military appearance.

b. Application procedures are prescribed by the Chief Trial Judge, U.S. Army Judiciary, who makes a comparative evaluation of applicants' qualifications. The Judge Advocate General then personally selects and certifies the officers to be trained or assigned as military judges. The number and type of selections will be upon consideration of individual qualifications and world-wide requirements.

c. (1) Special Court-Martial military judges to be assigned to the Trial Judiciary and other officers authorized to attend the Military Judge Course are selected from applicants experienced in military criminal law who are majors, promotable captains, captains who have completed their obligated tours of service and are in a Regular Army or voluntary-indefinite status.

(2) General Court-Martial military judges are selected from field grade officers who have at least eight years' active judge advocate service. Officers may be selected for GCM certification by three processes:

(a) The Judge Advocate General may directly

select field grade judge advocates not then assigned in the Trial Judiciary who possess exceptional qualifications and competence in military criminal law.

(b) Colonels or Lieutenant Colonels not assigned to the Trial Judiciary may apply for selection by letter through the Chief Trial Judge, and Chief Judge, U.S. Army Judiciary, to The Judge Advocate General.

(c) Majors not currently assigned to the Trial Judiciary but certified as special court-martial military judges and with at least two years fulltime duty as a military judge will also be considered for GCM certification and assignment to the Trial Judiciary as general court-martial judges. Selection will be made only of those who have demonstrated the personal qualities and professional competence expected of judges who preside over the most complex and important trials. Officers in the grades of major and captain who are currently assigned to the Trial Judiciary as special court-martial judges will not be considered for certification and assignment as general court-martial judges without an intervening assignment, other than for schooling, outside the Trial Judiciary.

d. Officers selected for assignment to the Trial Judiciary will be sent to the Military Judge Course if they have not previously completed it. Applicants who are not selected for assignment to the Trial Judiciary may be authorized with the use of local command funds to attend the Military Judge Course for certification upon completion and possible future assignment to the Trial Judiciary. No officer who fails to complete successfully the Military Judge Course or its equivalent will be certified.

e. Officers interested in applying for certification or assignment as military judges should apply in writing to the Chief Trial Judge HQDA (JAAJ-TJ), Nassif Building, Falls Church, VA 22041, and furnish a copy of the request to the Chief, Personnel, Plans, and Training Office, Office of The Judge Advocate General, HQDA (DAJA-PT), Washington, D.C. 20310.

## 3. Assignments.

## CAPTAINS

NAME	FROM	TO	APPROX DATE
ADDY, John K.	USA Ballistic Missile Redstone Arsenal, AL	Korea	Dec 77
ALTIERI, Richard T.	4th Inf. Div., Ft. Carson, CO	USALSA	Nov 77
ARPEN, Tracey I.	USA RGN SPT ELE APO 09227	USASA Fld. Sta. APO 09458	Dec 77
BLACKBURN, David J.	USA Air Def. Ctr. Ft. Bliss, TX	Elec. Mat. Readiness Cmd. VHS, VA	Oct 77
BRYANT, Edward G.	4th Inf. Div., Ft. Carson, CO	USMA, West Point, NY	Nov 77
JOHNSON, Stanley M.	2d Inf. Div., APO 96224	4th Inf. Div., Ft. Carson, CO	Jan 78
KEEFE, Thaddeus J., III	Health Svcs. Cmd., Ft. Sam Houston, TX	KOREA	Nov 77
KIRKPATRICK, Neal B.	19th Sup. Gp., APO 96212	USMA, West Point, NY	Jan 78
LEE, Verndal C.	19th Sup. Gp., APO 96212	9th Inf. Div., Ft. Lewis, WA	Jan 78
LEWIS, William E.	7th Trans. Gp., Ft. Eustis, VA	KOREA	Nov 77
MC DOUGALL, Dan C.	USATC Engr., Ft. Leonard Wood, MO	Dugway Proving Ground, UT	Nov 77
MOISE, Philip H.	Korea	USATC, Ft. Jackson, SC	Feb 78
O'BRIEN, Kevin E.	USA Berlin	USALSA	Dec 77
PELUSO, Andrew J.	2d Inf. Div., APO 96224	MTMC, Oakland, CA	Feb 78
PETERSEN, Robert M.	QM Ctr., Ft. Lee, VA	Log. Mgt. Ctr., Ft. Lee, VA	Oct 77
PHILLIPS, Stephen S.	USALSA	Crim. Investigation Cmd., Falls Church, VA	Aug 77
STEINBECK, Mark A.	Korea	24th Inf. Div., Ft. Stewart, GA	Dec 77
WARNER, Ronald A.	USALSA	Trans. Ctr., Ft. Eustis, VA	Oct 77

## 4. RA Promotions.

MAJOR		CAPTAIN	
CORRIGAN, Dennis M.	27 Sep 77	PEDERSEN, Walton E.	3 Jun 77
GENTRY, William O.	27 Sep 77		
GILLEY, Dewey C., Jr.	28 Sep 77		
GILLIGAN, Francis A.	5 Sep 77		
HERKENHOFF, Walter	19 Sep 77		
LANE, Jack F.	28 Sep 77		
WEINBERG, Paul	9 Sep 77		

## 5. AUS Promotions.

LIEUTENANT COLONEL	
GIDEON, Wendell R.	4 Aug 77

## LIEUTENANT COLONEL

GREEN, Fred K. 9 Aug 77  
 HANDCOX, Robert C. 11 Aug 77  
 NAUGHTON, John F. 11 Aug 77

## CAPTAIN

BRANSETTER, Ross W. 6 Jul 77

## CW4

## MAJOR

FRANKEL, Ronald S. 3 Jun 77  
 BUFKIN, Henry P. 3 Jun 77

BASTILLE, Wilfred N. 5 Aug 77  
 JUST, Dale F. 5 Aug 77  
 YOUNG, Seburn V. 5 Aug 77

### Reassignments of Chief and Senior Legal Clerks and Court Reporters

Name	Grade	From	To
Balke, James	E-8	Germany	Fort Polk, LA
Herrmann, Donald	E-8	Restone Arsenal, AL	Germany
Blackwell, Ronald	E-7	Hawaii	Fort Bragg, NC
Boltwood, Charles	E-7	Korea	Fort Bragg, NC
Brown, William	E-7	Fort Campbell, KY	Germany
Burnham, Bruce	E-7	Fort Gordon, GA	Germany
Collette, Francis	E-7	Korea	Fort Knox, KY
Crocker, James	E-7	Germany	Fort Benjamin Harrison, IN
Davis, William	E-7	Fort Campbell, KY	Japan
Franklin, Lawrence	E-7	Korea	Fort Carson, CO
Henry, Donald	E-7	Fort McClellan, AL	Germany
Higgins, James	E-7	Germany	Fort Carson, CO
Hinkle, Clair	E-7	Germany	Fort Bragg, NC
Jolly, James	E-7	Fort Ord, CA	Germany
Lamorte, William	E-7	Fort Hood, TX	Germany
Lanford, Dwight	E-7	Fort Hood, TX	Germany
Lindsay, Perry	E-7	Germany	Fort Polk, LA
Malone, Alpheus	E-7	Fort Lewis, WA	Germany
Naffziger, Leonard	E-7	Korea	Fort Riley, KS
Nichols, Tex	E-7	Fort Ord, CA	Germany
Parker, Thomas	E-7	Germany	Fort Sam Houston, TX
Poston, Carl	E-7	Germany	Fort Hood, TX
Pribil, Jacob	E-7	Germany	Fort Benjamin Harrison, IN

Name	Grade	From	To
Salazar, Mary	E-7	Fort Hood, TX	Germany
Sallee, Gary	E-7	Presidio of San Francisco, CA	Germany
Smith, Michael	E-7	Germany	Fort Campbell, KY
Straney, Larry	E-7	Fort Benning, GA	Korea
Williams, Robert	E-7	Germany	Fort Sam Houston, TX

### Current Materials of Interest

#### Articles

Brenscheidt, *The Recognition and Enforcement of Foreign Money Judgments in the Federal Republic of Germany*, 11 INT'L LAW. 261 (1977).

Hoffman, *The Substantive Jurisdiction of an International Criminal Court*, 11 INT'L LAW. 377 (1977).

Review of Supreme Court's Work, *Criminal Law*, 46 U.S.L.W. 3061 (1977).

The Supreme Court 1976-77 Term, *Search and Seizure*, 21 CRIM. L. REP. (BNA) 4133 (1977).

The Supreme Court 1976-77 Term, *Interrogation*, 21 CRIM. L. REP. (BNA) 4134 (1977).

The Supreme Court 1976-77, *Identification*, 21 CRIM. L. REP. (BNA) 4136 (1977).

The Supreme Court 1976-77 Term, *Right to Counsel*, 21 CRIM. L. REP. (BNA) 4136 (1977).

The Supreme Court 1976-77 Term, *Right to Counsel*, 21 CRIM. L. REP. (BNA) 4137 (1977).

#### Statutes

*ABA Code of Professional Responsibility Amendments*, 46 U.S.L.W. 1 (1977).

#### AR

AR 600-21, Equal Opportunity Program In the Army, 20 June 1977, is effective 1 September 1977. This regulation supersedes AR 600-21, 26 July 1973 and AR 600-42, 11 December 1973. The new AR 600-21 was discussed in message 252022Z JUL 77, Subject: On-Post and Off-Post Facilities and Functions.

#### Current Military Justice Library

3 M.J. No. 7.

3 M.J. No. 8.

By Order of the Secretary of the Army:

Official:

**JAMES C. PENNINGTON**  
*Brigadier General, United States Army*  
*The Adjutant General*

**BERNARD W. ROGERS**  
*General United States Army*  
*Chief of Staff*

1950

1951

1952

1953

1954

1955

1956

1957

1958

1959

1960

1961

1962

1963

1964

1965

1966

1967

1968

1969

1970

1971

1972

1973

1974

1975

1976

1977

1978

1979

1980

1981

1982

1983

1984

1985

1986

1987

1988

1989

1990

1991

1992

1993